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Supreme Court of the United States

OCTOBER TERM, 1978.

No. 78-1945

UNIVERSITIES RESEARCH ASSOCIATION, INC.,
Petitioner,

vs.

STANLEY E. COUTU,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

ROBERT E. MANN,
GERALD D. SKONING,
STEPHEN T. MYKING,
SEYFARTH, SHAW, FAIRWEATHER & GERALDSON,
Suite 4200,
55 East Monroe Street,
Chicago, Illinois 60603,
(312) 346-8000,
Attorneys for Petitioner.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner, Universities Research Association, Inc., prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered April 4, 1979.

OPINION BELOW.

The opinion entered in this case by the Circuit Court of Appeals is reproduced as Appendix A. Two opinions entered in this case by the District Court are reproduced as Appendix B (McGarr, J., entered October 8, 1975) and Appendix C (Leighton, J., entered November 29, 1977).

JURISDICTION.

This Petition relies upon 28 U.S.C. § 1254(1) for jurisdictional ground. The decision of the Court of Appeals was entered April 4, 1979 and a stay of issuance of mandate was granted.

QUESTION PRESENTED.

Whether the Court of Appeals, reversing the District Court, erroneously construed the Davis-Bacon Act[1] by holding that the District Court had jurisdiction thereunder to alter in favor of a third party substantive terms of a federal contract which was valid as between the contracting parties.

STATUTORY PROVISIONS INVOLVED.

The Davis-Bacon Act, as amended, is reproduced verbatim as Appendix D.

1. 40 U. S. C. § 276a *et seq.*

STATEMENT OF THE CASE.

Respondent (Plaintiff below) is an electronics technician who was employed by Petitioner (Defendant below) during the years 1972 through 1975. Petitioner is a not-for-profit incorporated research association representing approximately 50 universities located in the United States and Canada.

A contract between the United States and Petitioner has been in force at all times relevant to this lawsuit.[2] The contract requires that Petitioner as representative of the Nation's high energy physics research community provide scientific and technical management services to the United States in connection with the construction and operation of Fermi National Accelerator Laboratory.

The Laboratory (known as "Fermilab") is owned by the Federal Government. It consists of physics laboratories, research and administrative offices, maintenance facilities, and the world's largest proton accelerator system and is located on a 6800 acre site near Batavia, in Kane and DuPage Counties, Illinois. All funds and all supplies, equipment and other resources used by Petitioner are supplied by the United States, through the Department of Energy as contracting agency; the agency maintains its own office and staff at the facility. The contract authorizes Petitioner to employ scientific, engineering, technical, administrative and operative personnel in order to accomplish Petitioner's responsibilities at Fermilab. Funds for compensation of such

2. The contract originally was issued by the Atomic Energy Commission and designated United States Contract No. AT(49-8)-3000; it later was assumed in turn by the Energy Research and Development Agency and by the Department of Energy, as successors to the responsibilities and authorities of the Atomic Energy Commission. See Energy Reorganization Act of 1974, 42 U. S. C. (Supp. V) § 5801 *et seq.*; Department of Energy Organization Act, PL 95-91, 91 Stat. 565. The contract now is designated United States Contract No. EY-76-C-02-3000, but otherwise substantively remains unchanged.

personnel also are provided by the United States in accordance with salary and benefit schedules appended to the contract and pursuant to stipulations set forth therein.

Respondent's complaint alleges that he performed "construction work" at Fermilab while employed by Petitioner as an electronics technician. Count I of the Complaint asserts that the contract between Petitioner and the United States obligated Petitioner to compensate him at so-called "prevailing" construction labor rates for the "construction" work he allegedly performed. Count II asserts that the Davis-Bacon Act obligated Petitioner to pay Respondent such rates irrespective of the contract terms which authorized his employment.[3]

The District Court dismissed Count I after examining the contract, finding no Davis-Bacon Act provisions, and, in turn, no basis therein to support Respondent's claim that the contract expressly obligated Petitioner to pay Respondent at so-called Davis-Bacon Act prevailing construction labor rates. See Appendix B hereto, and the opinion of the Court of Appeals at pp. A2, 4, hereto. Central to that ruling was the following provision of the contract:

> "This contract does not contemplate the performance of work by the Association [Petitioner herein] with its own employees, which the Commission [formerly Atomic Energy Commission, now Department of Energy] determines is subject to the Davis-Bacon Act. Such work, if any, performed under this contract shall be procured by subcontracts which shall be subject to the written approval of the Commission and contain the provisions relative to labor and wages required by law to be included in contracts for the construction, alteration, and/or repair, including painting and decorating, of a public building or public work." (As correctly quoted by the Court of Appeals; see pp. A5, hereto.)

The District Court held that the foregoing provision would not support a claim for construction labor rates pursuant to the

3. The Complaint includes several other counts seeking comparable relief on the basis of assorted common law theories.

Davis-Bacon Act and/or the contract unless Respondent could show that the government contracting agency expressly had determined that the work for which such wages were claimed was subject to Davis-Bacon Act and had authorized Petitioner to perform it with its own employees. (Appendix B hereto at p. A17.) The case was left open to permit Respondent an opportunity to prove the existence of such a determination, if he could. Count I, accordingly, was dismissed.

Respondent thereafter attempted by means of Freedom of Information Act procedures, discovery depositions of seven officials of Petitioner, and a discovery deposition of an official of the Department of Energy contracting agency to determine whether the agency had rendered a Davis-Bacon Act coverage determination regarding work he performed. He found none.

In addition, Petitioner's general counsel submitted an affidavit that no such determination had been made.

Accordingly, Petitioner moved for issuance of a summary judgment as to Count II and the pendant common law counts. On November 29, 1977, the District Court granted the motion. The Court noted Respondent's failure/inability to identify any contract basis for his claim and held that it would be improper for the Court to declare in the first instance that the contract is subject to the Davis-Bacon Act and to make wage determinations for the parties. (See Appendix C hereto at p. A27.)

Respondent appealed to the Court of Appeals from the District Court's second ruling.

On April 4, 1979, the Court of Appeals reversed the District Court. It held that the District Court did have jurisdiction to determine whether Respondent performed construction work, and to revise the contract if the Court found that he did perform such work. The Court also held that Respondent would not be required to exhaust administrative remedies, and that Respondent had standing to sue, all irrespective of the lack of any showing that the contracting agency had made a Davis-Bacon Act coverage determination with respect to his work.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI.

THE NOVEL AND UNPRECEDENTED DECISION OF THE COURT OF APPEALS PRESENTS AN EXTREMELY IMPORTANT FEDERAL QUESTION WHICH MUST BE RESOLVED BY THIS COURT.

A. The Court's Decision Is a Wholesale Departure from Existing Law Relative to Government Contracting.

The Davis-Bacon Act is one of three basic labor contract standards statutes enacted by Congress to regulate federal contracting.[4] Each vests the Secretary of Labor with regulatory authority to interpret its substantive terms, including those dealing with coverage. 40 U. S. C. § 276c.; 41 U. S. C. § 38; 41 U. S. C. § 353(a). The Courts have held repeatedly and definitively that the Secretary of Labor, not the Courts, is ultimately responsible for determining such coverage. *Endicott Johnson Corp.* v. *Perkins,* 317 U. S. 501, 63 Sup. Ct. 339 (1943); *Nello L. Teer* v. *United States,* 348 F. 2d 533, 539-40 (Ct. Cl., 1965); *Curtiss-Wright Corp.* v. *McLucas,* 364 F. Supp. 750 (D. N. J. 1973); *March 9, 1979 opinion of the Attorney General of the United States,* 58 Daily Labor Report D-1 (BNA, March 23, 1979). In *Perkins* v. *Lukens Steel Co.,* 310 U. S. 113, 60 Sup. Ct. 869 (1940), this Court clearly held that judicial intervention into the authorities of the Secretary of Labor under the contracting statutes would constitute blatant violation of the doctrine of separation of powers, and would not be allowed. *Id.* at 310 U. S. 127-129; 60 Sup. Ct. at 876-877.[5]

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4. The Walsh-Healy Act, 41 U. S. C. § 35 *et seq.,* and the Service Contract Act, 41 U. S. C. § 351 *et seq.* are the others.

5. *See also, United States* v. *Binghamton Const. Co.,* 347 U. S. 171, 74 Sup. Ct. 438 (1954), citing with approval the *Endicott*

(Footnote continued on next page.)

It is equally well settled that the courts have no jurisdiction to alter a government contract. *United States* v. *Joseph A. Holpuch Co.*, 328 U.S. 234, 66 Sup. Ct. 1000 (1946); *International Association of Machinists* v. *Hodgson*, 515 F. 2d 373 (2nd Cir. 1975); *Framlau Corporation* v. *Dembling*, 360 F. Supp. 806 (E. D. Pa. 1973).

The decision of the Court of Appeals, that the District Court would have jurisdiction to refashion, retrospectively, government contract provisions mandated by Department of Energy Regulations approved by the Department of Labor (41 C. F. R. § 9-18.702 *et seq.*) on the basis of its own finding that work performed was "construction" work as the Court may define the term, is in stark contrast to the foregoing body of settled case law. The Court of Appeals' decision represents such a gross departure from all prior judicial opinion except its own in an arena—federal contracting—of extreme national importance, that this Court must grant review in order to preserve federal contracting stability and restore consistency within the federal judiciary.[6]

(Footnote continued from preceding page.)

Johnson and *Lukens Steel* decisions, and also citing with approval the early decision of the Fifth Circuit Court of Appeals, *Gilloz* v. *Webb*, 99 F. 2d 585 (5th Cir. 1938), holding that a determination by the Secretary of Labor is a non-reviewable condition precedent to suit for recovery of wages allegedly required to be paid pursuant to Davis-Bacon Act.

6. The only prior judicial incursion into the area is represented by the Court of Appeals' decision in *McDaniel* v. *University of Chicago*, 512 F. 2d 583 (7th Cir. 1975), *vacated and remanded*, 423 U. S. 810, 96 Sup. Ct. 20 (1975), decision on remand, 548 F. 2d 689 (7th Cir. 1977), *cert. den.*, 434 U. S. 1033, 98 Sup. Ct. 765 (1977). However, that decision was confined to the question whether express Davis-Bacon Act wage rate stipulations (assuming the existence thereof) would be subject to judicial enforcement, as an alternate remedy, upon a showing that the usual statutory remedy was inadequate, 512 F. 2d at 588, 584 F. 2d at 692; *United States for use and benefit of Glynn* v. *Capelletti Bros.*, 448 F. Supp. 66 (S. D. Fla. 1978). By its latest decision in this case, the Court of Appeals has not only recognized the existence of a *remedy*, it now has authorized the District Court to create the *right*, as it freely admits. A12.

B. The Court of Appeals Has Introduced a Grave Uncertainty Into All Federal Contracting.

The Court of Appeals now has placed federal contractors subject to its jurisdiction at risk of having their federal contracts rewritten by the federal district courts to create obligations not voluntarily assumed, and not contemplated by the contracting parties. It holds that the Federal District Courts have jurisdiction to insert new terms into a completed federal contract and enforce such new terms at the instance of a third party, notwithstanding the absence of any determination by the government contracting agency.

The practical effect of this decision will be to discourage all contractors from accepting federal contracts so long as the potential exists for *ex post facto* judicial revision of the terms.

To appreciate the enormity of the Court's holding, the position of the Petitioner must be considered: here is a *not-for-profit*[7] education and scientific research entity assisting the Department monies supplied directly for that purpose and strict ac- the United States' leadership position in scientific research.[8] That entity, Petitioner herein, exists solely to provide such assistance to the government, spends funds only as the government allows, directs and provides, employs only such employees as the government allows, and compensates such employees with government monies supplied directly for that purpose and strict accordance with salary and benefit schedules set forth in the contract.

Petitioner employed Respondent to operate computers monitoring the operation of the proton accelerator system and to

7. Under the contract, Petitioner is paid a fixed "management allowance" which must be spent in furtherance of the scientific mission of the Laboratory (*e.g.*, to sponsor scientific symposia, lectures and demonstrations) and is subject to government audit.

8. That mandate originally was spelled out in the Atomic Energy Act of 1954 (42 U. S. C. §§ 2011, 2031, 2051 *et seq.*) and passed to the Department of Energy via the Energy Reorganization Act of 1974 (42 U. S. C. (Supp. V), § 5801 *et seq.*).

perform related tasks in aid of the research program; Respondent was paid in accordance with the contract rate schedules.

Now, however, the Court holds that Petitioner may be liable for retroactive payment of additional compensation to Respondent based on wage schedules which were not included in the contract if Respondent can prove after the fact that his work was "construction" work, as the District Court may construe that term, despite the fact that the contracting agency has made no such determination, and despite the fact that the contract expressly conditioned payment of Davis-Bacon Act prevailing rates upon a prior determination by the government that the work paid for thereby was covered.[9]

Introduction of such uncertainty into the processes of government contracting surely will compromise severely the government's ability to function, particularly in the areas of research and development. This Court must review that decision in order to preserve and protect the government's authority to contract effectively.

C. The Court of Appeals Decision Conflicts with the Express Terms of the Statute.

(a) The Decision Divests the Secretary of Labor of His Statutory Authority.

The Davis Bacon Act directs agencies of the Executive Branch to include certain minimum rate provisions in bid specifications for any contract covering "construction, alteration and/or repair . . ." of public buildings and works if the contract requires that the contract utilize "mechanics or laborers." 40 U. S. C. § 276a. Its purpose is to foster social policy by eliminating pay rate differentials as bases for competitive bidding on federal contracts. *March 9, 1979 opinion of the Attorney General of the United States,* 58 Daily Labor Report D-1 (BNA, March 23, 1979 at pp. D-1, D-2).

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9. The condition flows logically from the fact that the government, not the contractor, is responsible for providing funds for employee compensation, under this contract.

Authority to define terms such as "construction, alteration and/or repair," to determine applicable minimum rates and the classes of "mechanics or laborers" subject thereto, and to administer and enforce the Act generally, is vested in the regulatory discretion of the Secretary of Labor. 40 U. S. C. § 276c; Reorganization Plan No. 14 of 1950, 15 F. R. 3176, 64 Stat. 1267.

Regulations adopted in pursuit of that authority are codified at 29 C.F.R. Part 5, Subpart A and are recognized to have the force and effect of law. *Perkins* v. *Lukens Steel Co., supra; Framlau Corp.* v. *Dembling,* 360 F. Supp. 806 (E. D. Pa. 1973).

Congress thus plainly vested the Secretary of Labor with responsibility to carry out the policies of the Act by granting him authority to determine coverage, to determine applicable rates and applications, and to enforce its terms. In turn, the Secretary has established a broad administrative and regulatory scheme in discharge of his responsibilities.

The Seventh Circuit Court of Appeals recognizes this authority of the Secretary of Labor. A4, 9-10 at fns. 6 and 11. Inexplicably, however, the Court rejected Petitioner's position that such authority was exclusive or at least subject to an exhaustion requirement; it held that while "there may be an exhaustion requirement" (A4 at fn. 6), this plaintiff (Respondent herein) was not subject to it and had standing to seek a completely *de novo* judicial determination that his work was covered by the Act (A9-10). The Court thus has divested the Secretary of Labor of his statutory authority to regulate the labor provisions of government contracts and has held that the District Court has jurisdiction to ignore the existence of a valid contract between Petitioner and the Department of Energy.

The ruling is in direct conflict with the decision of the Court of Appeals for the District of Columbia in a case arising under a companion contracting statute, *International Associa-*

tion of Machinists and Aerospace Workers, AFL-CIO v. *Hodgson,* 515 F. 2d 373 (C. A. D. C. 1975) at 379, holding that the District Court would not have jurisdiction to refashion a valid government contract in order to provide third parties with a remedy against the contractor. It is in direct conflict with this Court's opinions in *Endicott Johnson* v. *Perkins,* 317 U. S. 501, 507-09, 63 Sup. Ct. 339, 342-43 (1943) and *Perkins* v. *Lukens Steel Co.,* 310 U. S. 113, 60 Sup. Ct. 869 (1940) as well as the decisions cited in part A above, all holding the authority of the Secretary of Labor under the contracting statutes to be exclusive. It is contrary to the long line of cases bottomed on this Court's decision in *Far East Conference* v. *United States,* 342 U.S. 570, 574-75, 72 Sup. Ct. 492, 494 (1952), holding that the federal courts must defer to the primary jurisdiction of Executive Branch Agencies vested by Congress with authority to resolve questions of application of regulatory statutes.[10]

The question whether Congress intended the Secretary of Labor to be the exclusive or primary arbiter of coverage and application disputes arising under the Davis-Bacon Act and other contracting statutes, or whether Congress intended that the various District Courts would have parallel jurisdiction *de novo* to resolve such disputes is of extreme national importance. Equally important is the question whether Congress intended that such disputes be resolved prior to performance of the contract or authorized the Courts effectively to revise a contract after or during performance. By its decision, the Court of Appeals has squarely departed from all prior judicial opinion on these issues. Its decision sets up a gross conflict and will foster confusion and uncertainty in what heretofore had been a settled area of the law. This Court must take jurisdiction of the

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10. *Cf. Curtiss-Wright Corporation* v. *McLucas,* 364 F. Supp. 750 at 769-773 (D. N. J. 1973) and cases cited therein as illustrations of application of the primary jurisdiction principle to questions of labor contract statute coverage.

case to re-establish order in the matter of government contracting.

(b) The Decision Conflicts with the Statutory Wage Rate Provisions.

Section 276a of the Davis-Bacon Act clearly provides that wage rates and other stipulations required by it are to be published as part of the bid specifications issued prior to contracting. A contractor thus must be given advance notice of the obligations he will assume if he enters into the contract; he is free to contract or not as he chooses based on such notice. The advance notice principle repeatedly has been recognized by this Court, *Perkins* v. *Lukens Steel Co., supra,* 310 U. S. at 127-129, 60 Sup. Ct. at 876-7, and by all other courts as well. *See, e.g., Gilloz* v. *Webb,* 99 F. 2d 585 (5th Cir. 1938):

> "The only difference between the function of the Secretary under the Act as originally drawn and under the Act, as amended, is that under the original Act the Secretary, as here, fixes the rate to be paid after a dispute has arisen and it then becomes part of the contract, while *under the Act as amended the Secretary fixes and writes it into the contract in advance.*" 99 F.2d at 587. (Emphasis added.)

Here, Petitioner's advance notice was that its contract did not contemplate performance of Davis-Bacon Act work by its employees, and would not require payment of Davis-Bacon Act rates absent a prior government determination that the work was covered thereby (A5).

The Court of Appeals, however, held that the rate may be fixed after the dispute has arisen, and by the Court, itself, under the guise of deciding whether or not the work was "construction," and regardless of any determination of coverage by the government.

Moreover, the Davis-Bacon Act also expressly provides that it:

> "shall not be construed to supersede or impair any authority otherwise granted by federal law to provide for establishment of specific wage rates." 40 U. S. C. § 276a-3.

The Court of Appeals expressly construed the Davis-Bacon Act to supersede statutory and regulatory authority granted the Department of Energy to enter into contracts, including contracts of the type which is before the Court providing for contractor payment of compensation at rates fixed by the Department of Energy and with funds provided directly by the Department of Energy for that purpose.[11] (A11)

The Court of Appeals' decision patently ignores the plain words of the statute; it injects a gross uncertainty into federal law respecting government contracting, and it therefore must be reviewed.

D. The Decision of the Court of Appeals Recognizes a Right of Action Not Contemplated by Congress.

The Court of Appeals held that the Respondent possessed legal standing to sue on his wage claim and was not limited to his statutory remedies.[12] Its holding suggests that each and every person employed under a federal contract has direct right of access to the federal courts to seek judicially made Davis-Bacon Act wage and coverage determinations as to his or her work, and to seek enforcement of such determinations against the contractor, retrospectively. The Court holds that such plaintiffs are

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11. *See* Atomic Energy Act of 1954, 42 U. S. C. §§ 2051, 2201(p) vesting such contracting and regulatory authority in the Atomic Energy Commission, and Energy Reorganization Act of 1974, 42 U. S. C. (Supp. V) § 5801 *et seq.*; Department of Energy Organization Act, PL 95-91, 91 Stat. 565, vesting authorities possessed by the AEC in the Department of Energy. Applicable regulations are codified at 41 C. F. R. Parts 1 and 9; *see esp.* 41 C. F. R. §§ 9-1.104, 9-15.5006 and 41 C. F. R. § 1-18.701-1.

12. Citing its own decision in *McDaniel* v. *University of Chicago*, 512 F. 2d 583 (7th Cir. 1975), *vacated and remanded*, 423 U. S. 810, 96 Sup. Ct. 20 (1975), 548 F. 2d 689 (7th Cir. 1977), *cert. den.*, 434 U. S. 1033, 98 Sup. Ct. 765 (1977). As noted above, however, the Court in the instant case went far beyond the remedy question and held that the District Court not only had jurisdiction to provide a forum but also had jurisdiction to refashion the contract in order to provide a new right.

not limited to the remedies and procedures afforded by the Act or by the terms of the subsisting contract and need not first seek administrative review or enforcement.[13]

The Congress plainly did not create for individual employees a private right of action to enforce Davis-Bacon Act contract specifications against a private contractor. Certainly there is no expression of such a right within the Act, as was noted by the Court in *McDaniel,* 548 F. 2d at 693. As against the contractor, all of the remedies set forth in the Act contemplate administrative action and/or prosecution by the government contracting agency. That scheme obviously is bottomed upon recognition generally of the government's preeminent need to maintain control of its contract relationships with private contractors, and in particular the government's exclusive authority to determine coverage in specific cases. *Perkins* v. *Lukens Steel Co., supra.* Therefore, by recognizing an implied right of direct action against a contractor for the benefit of employees working under government contracts, the Court of Appeals has created a potential for massive judicial interference with the orderly processes of government contracting. The potential exists for disruptive suspension of work-in-progress, continual renegotiation of contracts, and, obviously, substantial withdrawal from the government contracting arena by contractors, such as your Petitioner, providing valuable research, development and other professional and scientific services.

It is submitted that this important question must be reviewed, notwithstanding the denial of certiorari in the *McDaniel* case, because the Court of Appeals has now ruled that the implied

13. The Court of Appeals argues, in justification of this novel theory, that statutory remedies are inadequate because the contracting agency itself could not require Petitioner to pay more money than it has paid for work already performed because there are no stipulations in the contract requiring such payment. A9-10 at fn. 11. Petitioner respectfully wonders how a contract which is binding on the contracting parties—indeed, upon a government contracting agency with abundant enforcement authority—can be altered by the Court at the behest of a third party.

right of action against the contractor will be recognized even where it is clear that no Davis-Bacon Act stipulations exist or were ever intended to exist, as between the contracting parties. Whatever may be said regarding the right of an employee to enforce express stipulations running to his advantage which the government chooses not to enforce on his behalf, there is clearly no warrant in law to recognize a right of action against a contractor to *create* such obligations and then to enforce such judicially-created obligations against the contractor. Such action by the Court of Appeals is utterly inconsistent with this Court's previous rulings.[14]

In *Cort* v. *Ash, supra,* this Court identified four considerations necessary to implication of a private right of action under a federal statute: (1) whether or not the plaintiff is an especial beneficiary of the statute; (2) whether or not the legislative intent is apparent; (3) whether or not recognizing a private right of action would be consistent with the legislative scheme; and (4) whether or not the cause of action is one traditionally relegated to state law. *Cf. Cannon* v. *University of Chicago,* ..... U. S. ....., ... Sup. Ct. ....., 47 Law Week 4549 (May 14, 1979), at footnote 9. Assuming, *arguendo,* that the matter is federal in nature, each of the other three circumstances plainly militates against implication of a Congressional intent to provide a private right of action.

Thus, while the plaintiff would benefit if the federal contract were rewritten to incorporate the new wage rates he seeks, it is doubtful that he can properly be considered an "especial" beneficiary of the law; this is so because the contract under which he was employed contemplates that construction work would not be performed by persons in his situation, but, rather, would be subcontracted.

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14. *Cort* v. *Ash,* 422 U. S. 66 (1975); *Securities Investor Protection* v. *Barbour,* 421 U. S. 412 (1975); *United States* v. *Babcock,* 250 U. S. 328 (1935).

Furthermore, implication of a private right of action clearly would be utterly inconsistent with the legislative history.[15]

Finally, a right of action not only to enforce *existing* federal contract provisions but to seek retrospective alteration of federal contract terms and conditions would be utterly and completely contrary to the legislative scheme. That scheme, as noted above, was intended to establish pre-contract conditions in order to eliminate bidding based on wage rate differences; integral thereto is the regulatory control delegated to contracting agencies and the Secretary of Labor. Implication of a private right of action retrospectively to alter a contract deemed valid as between the government contractor and the government plainly would frustrate the legislative scheme, would invade the discretionary responsibilities of the Executive Branch, and would introduce grave uncertainties into all federal contracts.

Under principles which are well established by this Court's prior decisions, therefore, recognition of a private right of action to alter a federal contract in the circumstances of this case must be deemed contrary to legislative intent. The Court of Appeals' action in the case obviously is so thoroughly at odds with the legislative intent and potentially so destructive of orderly federal contracting, it must be reviewed by this Court.

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15. A succinct analysis of the relevant legislative history is made by the Solicitor General of the United States in his *amicus curiae* brief filed with this Court in *University of Chicago* v. *McDaniel*, 434 U. S. 1033 (No. 76-1464, 1977) at pp. 16-19. As noted therein, the Solicitor General found in the legislative history a clear indication that Congress did not intend to create such a right of action. The Solicitor General's opinion is buttressed by the fact that no implied right of action had been thought necessary to achieve the purposes of the Act during the first 45 years of its history, and despite repeated legislative inquiries as to its administration.

CONCLUSION.

For the reasons stated, Petitioner respectfully requests this Court to grant its petition for a writ of certiorari to the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

ROBERT E. MANN,
GERALD D. SKONING,
STEPHEN T. MYKING,
SEYFARTH, SHAW, FAIRWEATHER & GERALDSON,
Suite 4200,
55 East Monroe Street,
Chicago, Illinois 60603,
(312) 346-8000,
Attorneys for Petitioner.

Appendices

APPENDIX A.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 78-1165

STANLEY E. COUTU, et al.,
Plaintiffs-Appellants,

vs.

UNIVERSITIES RESEARCH ASSOCIATION, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 75 C 1129—George N. Leighton, *Judge.*

HEARD DECEMBER 6, 1978—DECIDED APRIL 4, 1979

Before CASTLE, *Senior Circuit Judge,* CUMMINGS and PELL, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* This action was brought by plaintiff, an electronics technician,[1] and his class seeking $5,000,000 in damages and other relief on the ground that defendant did not pay them the prevailing wages required by the Davis-Bacon Act (40 U. S. C. § 276a *et seq.*) for their construction work. Defendant is a not-for-profit consortium of universities formed to facilitate scientific research and to design, construct and

1. Plaintiff was employed by defendant at the Fermi National Accelerator Laboratory from 1972 until he resigned three years later.

operate the Fermi National Accelerator Laboratory in Batavia, Illinois. This facility is a 6800-acre Kane County site containing laboratories, research offices, related facilities, and the world's largest proton accelerator system. It is used to carry out research in the field of high-energy physics by numerous scientists from institutions located throughout the world. (App. 50 n. 3.) The Davis-Bacon Act requires government construction contracts to contain a provision stating that the minimum wages to be paid various classes of laborers and mechanics shall be based upon the wages to be determined by the Secretary of Labor to be prevailing where the work is to be performed. 40 U. S. C. § 276a(a). We held in *McDaniel* v. *University of Chicago*, 512 F. 2d 583 (7th Cir. 1975), reaffirmed on remand, 548 F. 2d 689 (7th Cir. 1977), certiorari denied, 434 U. S. 1033, that employees have an implied private right of action to sue for wages due under the Act. Our decision in the present case flows directly from the *McDaniel* opinions. The complications arise only from the procedural posture of the case and from defendant's renewed attempts to establish an exhaustion requirement.

Plaintiff and his class alleged in their "First Cause of Action" (hereinafter "Count I") that defendant violated the Davis-Bacon Act by not paying members of plaintiff's class the minimum wages "required to be paid pursuant to the said contract and the prevailing wage determinations of the Secretary of Labor and the Davis-Bacon Act" (App. 2). Count I was dismissed in an unreported October 8, 1975, memorandum opinion and order of Judge McGarr. However, that order did not dismiss the remaining six Counts of the complaint.

On August 10, 1976, Judge Leighton, to whom the class action had been transferred, certified the plaintiff class.[2] Dis-

2. The class was described as follows:

"All 'mechanics and/or laborers' employed by defendant pursuant to Contract No. AT (49-8)-3000 between defendant and the United States of America 'for construction, alteration

(Footnote continued on next page.)

covery was apparently stayed in February 1977.[3] In March 1977, defendant filed a motion for summary judgment. In November 1977, Judge Leighton handed down a memorandum order granting that motion. The court noted that in Count II the plaintiff class alleged that the contract fell within the purview of the Davis-Bacon Act and that the contract by its terms provides for "payment to members of plaintiff class at the legal wage rate applicable to work actually performed." In this memorandum order, the district court noted that no Davis-Bacon Act stipulations requiring the payment of prevailing wages were ever made a part of the contract between defendant and the United States.[4] The court noted that the plaintiff class was relying on Article XXXIII of the contract providing that the contract did not contemplate the performance of work by defendant with its own employees "which the Commission [now the Energy Research and Development Administration (ERDA)[5]] determines is subject to the Davis-Bacon Act" and that such work was to be procured by subcontracts containing "the [Davis-Bacon] provisions relative to labor and wages required by law." The court then held that the contract failed

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(Footnote continued from preceding page.)

> and/or repair, including painting and decorating, of public buildings and public works of the United States' who have been paid wages less than 'the wages * * * determined by the Secretary of Labor to be prevailing for the various classes of laborers and mechanics * * * in the city, town, village, or other civil subdivision of the State' in which the work was performed, all as stated and defined in the Davis-Bacon Act, 40 U. S. C. § 276a, *et seq.*"

3. Plaintiff apparently relies on Judge Leighton's minute order of February 18, 1977, stating "P/T completed" to show discovery was thereby stayed. Defendant's brief nowhere disputes the stay. An earlier discovery stay was ordered by Judge McGarr on December 22, 1975.

4. In this respect, the court relied on an affidavit of John R. Frazier, chief legal counsel for the Fermi National Accelerator Laboratory. As will be seen, this affidavit does not resolve the controversy.

5. ERDA is the successor to the Atomic Energy Commission.

to contain the "requisite Davis-Bacon Act specifications for maintenance of the claims stated in Count II" and accordingly dismissed that Count. Counts III through VII of the complaint were based on state claims, and the district court declined to assert pendent jurisdiction over them "due to the legally insubstantial nature of the federal claims." Therefore, the complaint was dismissed in its entirety.

No notice of appeal was filed with respect to Judge McGarr's dismissal of Count I of the complaint, so that the principal question before us is whether Count II, asserting that defendant breached contractual obligations to the members of plaintiff class, was properly dismissed. At the outset, the parties disagree on what was decided by Judge McGarr and therefore what remained to be decided by Judge Leighton. The defendant insists that only two narrow fact questions were left open by Judge McGarr: (1) whether the contract actually contained Davis-Bacon Act stipulations and, if so, (2) whether Davis-Bacon Act work was performed by members of the plaintiff class. If this were all that was left for Judge Leighton to decide, the affidavit that there were no Davis-Bacon Act stipulations (n. 4 *supra*) might require affirmance of the summary judgment. However, we do not believe that Judge McGarr reduced the suit to a simple case of whether express wage stipulations in the contract had been breached. On the contrary, in dismissing Count I Judge McGarr held only that if the contract was not a Davis-Bacon Act contract plaintiff could not recover.[6] Clearly

6. There is some support for the proposition that if work covered by the Davis-Bacon Act happens to be performed under a contract which did not intend that such work be performed by anyone, it is not covered by the Act. 40 Comp. Gen. 565 (1961). This interpretation, however, raises the additional question of who is to decide whether a contract is subject to the Act. Judge McGarr appeared to accept defendant's contention that authority to make this determination was accorded exclusively to the executive departments so that their decisions in this regard are not subject to judicial review (App. 23). We note in addition that even if such administrative action is reviewable, there may be an exhaustion requirement. We do not decide any of these questions, since they are not before us.

if a contract contains the required wage stipulations, this would show that it was a Davis-Bacon Act contract. Judge McGarr apparently recognized, however, and we agree, that clauses in the contract other than the wage stipulations may reveal that the contract was one for Davis-Bacon Act work (App. 25).

Thus two theories of recovery remained open to the plaintiff class after Judge McGarr's dismissal: (1) there may have been Davis-Bacon Act stipulations in the contract or (2) there may have been other evidence that the contract was one for Davis-Bacon Act work, in which case the required stipulations arguably become a part of the contract by operation of law. Judge Leighton's grant of summary judgment was based on the affidavit (n. 4 *supra*) tending to disprove only the first of these two theories. We hold that summary judgment was improperly entered against plaintiff and his class because the required wage stipulations were incorporated by operation of law.

The Davis-Bacon Act Applies to Construction, Alteration or Repair Work Performed by Defendant

The key provision in the Contract between defendant and the United States Government acting through ERDA is Article XXXIII which provides in pertinent part as follows:

> "This contract does not contemplate the performance of work by the Association, with its own employees, which the Commission determines is subject to the Davis-Bacon Act. Such work, if any, performed under this contract shall be procured by subcontracts which shall be subject to the written approval of the Commission and contain the provisions relative to labor and wages required by law to be included in contracts for the construction, alteration, and/or repair, including painting and decorating, of a public building or public work."

In this lawsuit, plaintiff contends that defendant's own employees performed and are performing construction, alteration and repair work at the Fermi Laboratory, so that the Davis-Bacon Act wage provisions are applicable to the work done by

plaintiff and his class. We agree that if the defendant actually performed such work with its own employees at the Fermi Laboratory, they became entitled to the prevailing wages in Kane County where the work was to be performed. This conclusion follows from our holding in *McDaniel* v. *University of Chicago, supra.*

McDaniel involved a government contract clause which is virtually identical to Article XXXIII of this contract. The contract at issue in *McDaniel* was between the Atomic Energy Commission and the University of Chicago for operation of the Argonne National Laboratory. That contract barred the University of Chicago from construction work of a kind subject to the Davis-Bacon Act. As with Article XXXIII of the present contract, the University of Chicago was to have all Davis-Bacon Act work performed by subcontractors.[7] We held that the construction or alteration work performed by the University of Chicago was subject to the provisions of the Davis-Bacon Act

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7. The applicable clause of the *McDaniel* contract between the University of Chicago and the Atomic Energy Commission provided:

> "26.5 *Davis-Bacon and Other Labor Provisions for Construction Subcontracts.*
>
> "The University and the Commission have agreed upon a procedure under which the Commission will determine when work to be undertaken at the Laboratory Facilities is covered by the Davis-Bacon Act. When it is determined that the Davis-Bacon Act does cover a particular work project, the University shall procure by subcontract the covered work. Any subcontract entered into under this section shall contain the provisions relative to labor and wages required by law to be included in contracts for the construction, alteration and/or repair, including painting and decorating, of a public building or public work. When requested by the Commission, any such subcontract shall be submitted for Commission approval.
>
> * * * * *
>
> "Supplement No. 16, Appendix D."
>
> (quoted at p. 1a of the Solicitor General's *amicus curiae* brief on petition for a writ of certiorari from the Supreme Court in *University of Chicago and Argonne* v. *McDaniel,* 434 U. S. 1033.)

even though the contract lacked a stipulation requiring the payment of Davis-Bacon Act wage rates, stating:

> "There is no question but that this government contract was subject to the provisions of the Davis-Bacon Act. Accordingly 40 U.S.C. § 276a required the specifications to 'contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work' in the place of performance, and required any contract based on the specifications to contain certain stipulations concerning payment of machanics and laborers by the contractor or subcontractor." (512 F. 2d at 584.)

Similarly here, the provisions of the Davis-Bacon Act must be read into Article XXXIII when, pursuant to a contract requiring Davis-Bacon Act work, the defendant performs "construction, alteration, and/or repair * * * of public buildings or public works of the United States * * * which requires or involves the employment of mechanics and/or laborers." Section 1 of the Davis-Bacon Act applies to such work in government contracts in excess of $2,000 and mandates that an employer must pay "wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the * * * subdivision of the State in which the work is to be performed * * *." 40 U. S. C. § 276a.

Indeed, in a January 23, 1973, letter from the Atomic Energy Commission's Chicago Operations Office Manager to the president of the defendant, both those parties foresaw that conditions might arise which might make it necessary for the defendant to perform Davis-Bacon Act work and in such instance to modify the contract to incorporate the Davis-Bacon Act provisions relative to labor and wages. Since under *McDaniel I* the contract

was already so modified by operation of law, amendments to the contract were not needed to accomplish that result.

McDaniel was not an isolated instance of reading applicable statutory requirements into government contracts. We were merely following precedents established as early as 1827 and applied consistently thereafter.[8] Because the provision to pay the prevailing wage rate was incorporated by operation of law, the affidavit relied upon by the district court to the effect that no Davis-Bacon Act "stipulations requiring the payment of prevailing wages have ever been made a part of or incorporated in" the contract (see n. 4 *supra*) is insufficient to support the grant of summary judgment. Therefore it was unnecessary for plaintiff to tender a counter-affidavit.

It is uncontested that the Secretary of Labor has published general wage determinations in decisions published in the Federal Register that are applicable to labor on government projects in Kane County, Illinois, where the Fermi Laboratory is located and where the defendant's alleged construction activity

8. See, *e.g.*, *Ogden* v. *Saunders*, 25 U. S. (12 Wheat.) 212 (1827); *Woods* v. *Lovett*, 313 U. S. 362, 370; *G. L. Christian & Associates* v. *United States*, 312 F. 2d 418, 320 F. 2d 345 (Ct. Cl. 1963), certiorari denied, 375 U. S. 954; *United States* v. *New Orleans Public Service Inc.*, 553 F. 2d 459, 469 (5th Cir. 1977); *Campagnie Générale Transatlantique* v. *American Tobacco Co.*, 31 F. 2d 663, 666 (2d Cir. 1929); *City of Tullahoma* v. *Coffee County*, 204 F. Supp. 794, 800 (E. D. Tenn. 1962); 3 Corbin on Contracts, § 551; 4 Williston on Contracts, § 615 at p. 621; Dees and Ginsberg, *Contract Interpretations and Defective Specifications* (Government Contracts Monograph No. 4, 1975 ed., George Washington University) 1-4.

United States v. *Joseph A. Holpuch Co.*, 328 U. S. 234, on which defendant relies, is not to the contrary. It did not concern the question whether applicable statutory terms must be read into government contracts. *International Association of Machinists* v. *Hodgson*, 515 F. 2d 373 (D. C. Cir. 1975), cited by defendant at oral argument, is also consistent with our holding. That case involved the Secretary of Labor's decision to exercise his discretion not to issue a wage determination under the Service Contract Act. The Davis-Bacon Act, however, confers no such discretion on him.

has been performed.[9] Therefore the district court was mistaken in concluding that to sustain plaintiff's position would require it to make wage determinations for the parties.

Exhaustion of Administrative Remedies Is Not Required

If defendant or our own research had uncovered administrative regulations affording plaintiff and his class relief in this situation, we might require recourse to that remedy before permitting this lawsuit to proceed. The Davis-Bacon Act itself does not contain a provision requiring exhaustion of administrative remedies in this kind of case. Moreover, we rejected such an argument in the second *McDaniel* case where the University of Chicago had argued that administrative procedures afforded adequate relief to the individual employees of a government contractor.[10] In the *McDaniel* cases, there was no showing that the plaintiff and his class had attempted to secure administrative relief, and in according them a judicial remedy we necessarily decided that there was no requirement that they first seek redress from the contractor or the Department of Labor. Moreover, the administrative procedures seem to be aimed at contractor compliance with the Davis-Bacon Act. Defendant has not shown that the Secretary of Labor has any authority to order a contractor to pay more for Davis-Bacon work already completed.[11] As the Government itself recognized in *McDaniel II*,

9. See 43 F. R. 11379-11383 containing the introductory notice to a recent compilation of the Secretary's wage determinations and decisions specifically applicable to government project work in Kane County. 42 F. R. 30108-30111, 35522, 39847-39848 contain examples of such decisions.

10. See p. 12 of supplemental brief for defendants-appellees in *McDaniel* v. *University of Chicago,* 548 F. 2d 689 (7th Cir. 1976), certiorari denied, 434 U. S. 1033.

11. Enforcement through contract termination and debarment from future contracts is provided for. 40 U. S. C. § 276a-1; 29 C. F. R. § 5.7(d); 29 C. F. R. § 5.6(b)(1). Additionally, the regulations provide for suspension of payments under the contract if the agency (here ERDA) determines the contractor has failed to

(Footnote continued on next page.)

> "Neither the statute nor the regulations promulgated thereunder provide any administraive remedy in favor of an employee who has been injured by the failure to include the prevailing-wage provisions in a contract." (Solicitor General's *amicus curiae* brief opposing the petition for a writ of certiorari in *University of Chicago and Argonne v. McDaniel,* 434 U. S. 1033, at 25, n. 20.)

Instead, the regulations are either inadequate as to this class or are merely detailed guidelines for determining what constitutes Davis-Bacon work.[12] While such regulations presumably facilitate contractor compliance, they do not assure a remedy to employees.[13]

The cases cited by defendant for the proposition that the administrative remedies are adequate involved contracts which

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"comply with labor standards stipulations * * *" (29 C. F. R. § 5.9). This remedy seems inadequate to assure the employees of a full recovery in the present case for three reasons: (1) it is based on the assumption that there are stipulations in the contract, (2) it provides for withholding payment only until the violations are discontinued or (apparently in the agency's discretion) enough has been withheld to compensate the employees, and (3) withholding funds is hardly feasible in this case since, as counsel for defendant advised us at oral argument, the defendant is merely a conduit for federal funds. It is thus not clear that such a contractor can or should be required to make restitution out of its own unrelated funds.

Finally, the regulations provide that "[t]he Agency Head may, in appropriate cases * * * request that restitution be made * * *." (29 C. F. R. § 5.10.) Apart from the fact that the precatory language of this regulation gives employees no sure means of redress, this would not seem to be an "appropriate case" for such restitution in view of the defendant's self-styled conduit nature.

12. See n. 11 *supra* and 41 C. F. R. §§ 9-18.701, 9-18.704, 9-18.740.

13. The Disputes clause contained in Article XIX of the contract with respect to the resolution of controversies between the contracting parties is inapplicable because it relates only to questions of fact whereas the question before us is essentially one of law, *vis.*, whether the provisions of the Davis-Bacon Act apply to construction, alteration or repair work performed by defendant's employees, and because this is not a controversy between the contracting parties.

did contain Davis-Bacon Act stipulations. The disputes in those cases focused on the proper classification of work[14] or the determination of wage rates.[15] These and other cases involving the finality of the Secretary of Labor's decisions regarding wage rates and job classifications are not germane to the central question in this case, which is whether the required wage rate stipulations are incorporated into the contract as a matter of law. That is not a question on which deference to agency expertise is appropriate.

In addition, defendant's reliance on Section 4 of the Act (40 U. S. C. § 276a-3)[16] is misplaced since defendant has been unable to identify anything in the Atomic Energy Act or any other federal statute that authorizes ERDA to establish specific wage rates. While 41 C. F. R. § 9-15.5006(i) recommends that wages as well as other costs be set out in ERDA contracts, this does not authorize ERDA to establish non Davis-Bacon Act rates in contracts to which that Act applies. Even if this were the intent of the regulation, since it is not authorized by law it could not qualify as an exception under Section 4 of the Act.[17]

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14. *North Georgia Building & Construction Trades Council* v. *Department of Transportation,* 399 F. Supp. 58 (N. D. Ga. 1975); *Framlau Corporation* v. *Dembling,* 360 F. Supp. 806 (E. D. Pa. 1973); *In re Stanford Linear Accelerator Center,* 16 Wage-Hour Cases 851 (Wage Appeals Board, Department of Labor 1965).

15. *International Union of Operating Engineers* v. *Arthurs,* 355 F. Supp. 7 (W. D. Okla. 1973), affirmed, 480 F. 2d 603 (10th Cir. 1973).

16. Section 4 of the Act provides:

> *"Effect on other Federal laws*
>
> "Sections 276a to 276a-5 of this title shall not be construed to supersede or impair any authority otherwise granted by Federal law to provide for the establishment of specific wage rates."

17. There is other evidence that ERDA is not authorized to set wage rates that do not comply with the Davis-Bacon Act. Executive Order 10789, pursuant to 50 U. S. C. § 1431, authorizes the Secretary of the Atomic Energy Commission (predecessor to ERDA) to

(Footnote continued on next page.)

Plaintiff must now be permitted to resume discovery (or employ other suitable means) to determine whether defendant used plaintiff and his class to perform construction, alteration or repair work at the Fermi Laboratory. If so, under the Davis-Bacon Act they will be entitled to recover wages that the Secretary of Labor has determined to be prevailing for the corresponding classes of laborers and mechanics employed on similar projects in Kane County, Illinois. Since the district court had jurisdiction over Count II, it also had pendent jurisdiction to decide state claims presented in Counts III-VII.

The judgment dismissing the complaint is reversed and the cause is remanded for further consideration consistent with this opinion.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

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enter into contracts containing certain limitations. Paragraph 13 of that Order specifically states that nothing in the Order shall be construed to allow the Secretary to set aside the requirements of the Davis-Bacon Act. If he already had that power by federal law, this provision in the Executive Order would be both superfluous and unavailing.

APPENDIX B.

Memorandum Opinion and Order

This is an action brought on behalf of the named plaintiff, Stanley Coutu, individually and as a representative of all persons similarly situated, seeking relief from certain practices in payment of wages by defendant to members of plaintiff's class. The complaint alleges seven causes of action, the first of which is based on the defendant's violation of the provisions of the Davis-Bacon Act, 40 U. S. C. § 276(a). The second cause of action alleges a breach of defendant's contractual obligations to plaintiff and the class under the Davis-Bacon Act contract set forth in the first cause of action and incorporated by reference in the remaining causes of action. Jurisdiction is predicated on 28 U. S. C. §§ 1331 and 1337, and under the Davis-Bacon Act, 40 U. S. C. § 276(a). The remaining causes of action are based on common law counts for fraud, restitution, and payment of indebtedness on account and contract. Jurisdiction is predicated on the allegation that each cause of action derives from a nucleus of operative fact common with the first cause of action, and is pendent thereto.

Leave to proceed on behalf of the class alleged has not been granted.

Defendant has moved for dismissal of plaintiff's complaint for any or all of eight reasons; the first three of which revolve around the same issue and will be treated collectively.

1. Defendant first moves for dismissal for the reason that this Court lacks jurisdiction over the subject matter of the complaint and/or the complaint fails to state a claim upon which relief can be granted, by reason of the plaintiff's failure to allege prior exhaustion of administrative procedures.

2. In the alternative, defendant urges the Court to defer, under the doctrine of Primary Jurisdiction, to administrative resolution of issues relating to application of the Davis-Bacon Act to work alleged under the sued-upon contract.

3. Furthermore, asserts defendant, the complaint fails to state a claim upon which relief can be granted and the Court lacks jurisdiction over the subject matter of the complaint, by reason of the absence of any allegations of determinations by the Atomic Energy Commission (now U. S. Energy and Research Development Administration, hereinafter referred to as ERDA), or by the Secretary of Labor, specifying that compensation is to be paid for work performed under the contract different than the rates of compensation actually set forth therein and approved by the United States through ERDA, or that defendant has not in fact compensated employees in accord with the rates specified in the contract, as approved by the United States through ERDA.

The defendant in its memorandum in support of its motion to dismiss has summarized the issues raised in paragraphs 1, 2 and 3 of its motion as follows: whether this Court has jurisdiction as a matter of law, or should as a matter of policy undertake to review, revoke or overrule, retroactively, determinations made by the agents of the United States government in the contract in question.

In his complaint, plaintiff has alleged a contract between the defendant and the United States for an amount in excess of $2,000 which provides for, among other things, construction, alteration and repair of public buildings or public works of the United States. Plaintiff has alleged that this contract requires or involves the employment of mechanics and laborers, and has further alleged that he and all the members of his class are mechanics and laborers employed by defendant pursuant to the said contract. The contract which plaintiff alleges exists between defendant and the United States is commonly referred to as Contract No. AT (49-8)-3000, a copy of which has been submitted to this Court by defendant.

In Paragraphs III and IV of what plaintiff labels his first cause of action, plaintiff alleges that the defendant has failed to pay to members of plaintiff's class the minimum wages required to be paid pursuant to the said contract and the prevailing wage determinations of the Secretary of Labor and the Davis-Bacon Act, 40 U. S. C. § 276a, *et seq*. This allegation contradicts the reasons which defendant cites for dismissal in the third paragraph of his motion. However, this allegation is not totally borne out by the alleged Contract No. AT (49-8)-3000.

Though the contract contains wage provisions, it does not contain the standard provisions found in a Davis-Bacon contract. 41 C. F. R. § 1-18.703-1. And as defendant has pointed out in the memorandum in support of its motion, the contract contains a clause in the labor provisions section which reads as follows:

> Article XXXIII—*Labor Provisions*
>
> 1. This contract does not contemplate the performance of work by the Association (defendant herein), with its own employees, which the Commission determines is subject to the Davis-Bacon Act. Such work, if any, performed under this contract shall be procured by subcontracts which shall be subject to the written approval of the Commission (i.e., ERDA). . . .
>
> (Contract AT (49-8)-3000, p. 54)

The defendant relies on the above contract provision and the absence of standard Davis-Bacon Act provisions to support its position that the contract in question is not a Davis-Bacon Act contract. From this position, defendant reasons that plaintiff has no cause of action pursuant to the contract upon which plaintiff can possibly base a claim for relief or over which the Court can take jurisdiction.

The defendant in its memorandum has soundly argued the position that the administrative determinations of the contract-

ing agency are subject only to review by the Secretary of Labor, for purposes of an authoritative ruling (29 C. F. R. 5.12), and in certain instances are appealable to the Wage and Appeals Board of the U. S. Department of Labor, 29 C. F. R. 5.11; 41 C. F. R. 7.10. Extrapolating on this position, defendant asserts that for this Court to take jurisdiction over plaintiff's alleged cause of action would be for the Court to subject the determinations of the Secretary of Labor to judicial review. This, the defendant asserts, the Court may not do, citing *United States* v. *Binghamton Construction Co., Inc.*, 347 U. S. 171, 74 S. Ct. 438 (1954) and *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 60 S. Ct. 869 (1940).

The plaintiff, in response to defendant's motion to dismiss and memorandum in support thereof, relies exclusively on the recent Seventh Circuit decision in *McDaniel* v. *University of Chicago*, 512 F. 2d 583 (7th Cir. 1975).

In *McDaniel*, the Court had before it a complaint containing allegations almost identical to those in the case at bar. The District Court concluded that the Davis-Bacon Act did not confer a right of action against the contractor, cognizable in Federal Court, under the circumstances alleged in the complaint. On appeal, the Circuit Court agreed that § 276a-2(b) of the Davis-Bacon Act did not create a cause of action, cognizable in Federal Court, for one in plaintiff's position; the Court did conclude, however, that "[W]age-earners have or may have rights of action under the contractual provisions required by § 276a which may be enforced in State Court actions or Federal Court actions where jurisdiction is properly based." *McDaniel*, 512 F. 2d 583, 586. The Court discussed the constitutional basis of the Davis-Bacon Act, finding the Act to be significantly based on the commerce clause. The Court therefore concluded that ". . . [P]laintiff's complaint, in that it sought to enforce defendant's contractual commitment to pay 'prevailing' wages as determined by the Secretary of Labor, stated a cause of action under the Davis-Bacon Act for which relief could be granted

and that subject matter jurisdiction was properly based upon 28 U. S. C. § 1337." *McDaniel,* 512 F. 2d 583, 588.

Defendant has attempted to distinguish *McDaniel* on the grounds that in *McDaniel,* there was no question but that the contract involved was a Davis-Bacon contract, while in the case at bar defendant asserts that the contract in question specifically excludes Davis-Bacon Act work. If true, plaintiff's reliance on *McDaniel* would surely be misplaced.

However, the purpose of a motion to dismiss is to test the legal sufficiency of the allegations of the complaint. 2A Moore's Federal Practice, 2265, 2266. The plaintiff herein has properly alleged a Davis-Bacon Act contract in his complaint, the only difficulty being that the specific contract which plaintiff alleges, Contract No. AT (49-8)-3000, does not bear out all of plaintiff's allegations. It does not, however, conclusively foreclose the possibility that plaintiff has stated a claim upon which relief may be granted.

Defendant relies on the contract clause taken from the labor provisions of the contract (quoted above) for its position that the contract does not contemplate the performance of Davis-Bacon work by defendant's employees. This clause, however, does not preclude the possibility of performance of Davis-Bacon Act work pursuant to the contract, albeit by someone other than defendant's employees. Furthermore, the Court is apprised of a correspondence between the defendant and the United States Atomic Energy Commission (ERDA) dated April 6, 1972, which has seemingly been incorporated into the alleged contract. This correspondence leaves open the possibility of performing the Davis-Bacon Act work by defendant's employees pursuant to proper Davis-Bacon determinations by ERDA with regard to the work to be performed, and pursuant to appropriate modification of the contract to incorporate the necessary provisions relative to wages and labor.

The Court is thus presented with factual considerations as to the existence of Davis-Bacon Act determinations by ERDA

pursuant to the contract, and as to performance of Davis-Bacon Act work, properly or improperly assigned to plaintiff and the class by defendant, as alleged by plaintiff. This Court cannot make factual determinations on a motion to dismiss. *Schafly* v. *Volpe,* 495 F. 2d 273 (7th Cir. 1974). Rather the complaint must be liberally construed with all factual allegations deemed to be true and with doubts resolved in favor of the pleader. *Parr* v. *Great Lakes Express Co.,* 484 F. 2d 767 (7th Cir. 1973). A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley* v. *Gibson,* 355 U. S. 41, 78 S. Ct. 99 (1957).

Thus, accepting plaintiff's allegations as true and construing all doubts in favor of plaintiff, this Court deems that plaintiff has alleged a cause of action in Count II on a Davis-Bacon contract which states a claim upon which relief may be granted and over which this Court has jurisdiction, based on the Seventh Circuit's finding in *McDaniel* that in such a cause of action jurisdiction may be properly predicated on 28 U. S. C. § 1337. Having asserted jurisdiction over this cause of action, the Court also has pendent jurisdiction to decide the state of claims arising out of the same facts, which have been set forth in counts three through seven of the complaint. *United Mine Workers* v. *Gibbs,* 383 U. S. 715, 86 S. Ct. 1130 (1966). This Court does not thereby seek to review the determinations of the Secretary of Labor of the contracting agency; rather the Court gives plaintiff leave to show that the Secretary of Labor through ERDA has made Davis-Bacon Act determinations with respect to the alleged contract, and that plaintiff and the class have performed such work at defendant's direction, pursuant to the contract.

Defendant's fourth reason for dismissal of plaintiff's complaint is based on the effect of the Portal-to-Portal Pay Act time limitations, 29 U. S. C. §§ 255, 256, which bar any action for unpaid minimum wages under the Davis-Bacon Act which is not commenced within two years after the accrual of the cause

of action. Defendant asserts that under the provisions of 29 U. S. C. § 256, governing when an action is commenced for purposes of tolling the statute of limitations set forth in 29 U. S. C. § 255, the cause of action herein is determined to have been commenced as to the named plaintiff on April 9, 1975, when his complaint and his written consent to become a party plaintiff were filed. Therefore, as to the named plaintiff, Stanley Coutu, the statute of limitations under § 255 would bar any cause of action for minimum wages which accrued prior to April 9, 1973.

Some Federal Courts have found that the lack of detail in notice pleading renders improper the raising of limitations questions by motion to dismiss, *see* Annot., 61 A. L. R. 2d 300, 327. However, in the Seventh Circuit a motion to dismiss raising the defense of the statute of limitations is proper where the bar of the statute can be seen from the face of the complaint. *Kincheloe* v. *Farmer,* 214 F. 2d 604 (7th Cir. 1954), *cert. denied,* 348 U. S. 920, 75 S. Ct. 306, 99 L. Ed. 721 (1955). In light of the Portal-to-Portal Act provisions with respect to actions under the Davis-Bacon Act, and in light of Rule 9A of the Federal Rules of Civil Procedure, the Court finds that defendant has properly raised the statute of limitations in his motion to dismiss.

The statutory language of § 255 clearly makes the statute of limitations applicable to plaintiff's Federal cause of action which predicates jurisdiction on 28 U. S. C. § 1337. The Court must apply state substantive law to state claims taken under pendent jurisdiction by a Federal Court. But while a statute of limitations is often considered to be a substantive matter, *J. M. Blythe* v. *Blalock,* 310 F. 2d 77 (5th Cir. 1962), the express purpose of 29 U. S. C. § 255 was to substitute a uniform Federal limitations period for the diverse periods provided under statutes of the several states. 29 U. S. C. § 251; *Hodgson* v. *Humphries,* 454 F. 2d 1279 (10th Cir. 1972). Thus the Court finds that the statute of limitations of § 255 is equally applicable to the

state claims taken under pendent jurisdiction insofar as they arise by virtue of a Federal statute, and the Court's jurisdiction over them depends on their pendency to a cause of action under a statute with a two-year limitation.

There remains the question, however, whether the two-year statute of limitations is applicable on the three-year limitation period for "willful" violations. 29 U. S. C. § 255(a). Though plaintiff has not specifically alleged "willfulness" in his complaint, with the exception of Count II, he has sufficiently pleaded his allegations to raise a factual issue as to whether defendant's actions were willful. The Court at this juncture cannot determine the issue of willfulness, but rather should defer a ruling on this issue until further evidence is presented at trial. *Bormann* v. *Long Island Press Publishing Co., Inc.,* 379 F. Supp. 951 (1974).

Defendant's fifth reason cited for dismissal of plaintiff's complaint is that it fails to state a claim upon which relief can be granted because of plaintiff's failure to allege a valid class under Rule 23 of the Federal Rules of Civil Procedure. The action is brought on behalf of the named plaintiff, individually, and as a representative of the class. Therefore, dismissal of the class would not dismiss the complaint. There has as yet been no determination as to whether the action may be maintained as a class action pursuant to Rule 23 of the Federal Rules. For these reasons, defendant's motion to dismiss for failure to allege a valid class action is unwarranted at this time.

Defendant's sixth ground for dismissal is based on plaintiff's failure to prosecute his claim pursuant to the provisions of the Miller Act, 40 U. S. C. § 270a-d, which requires defendant to procure a bond for payment of laborers and mechanics pursuant to contracts of the type in question. Defendant also asserts that plaintiff has failed to prosecute his claim under the provisions of the Davis-Bacon Act, 40 U. S. C. § 270a-2(b), which authorizes withholding of funds from the contractor for payment of

unpaid laborers and mechanics employed pursuant to the contract.

The cause of action on defendant's contractual commitment under the Davis-Bacon contract is distinct from that on a Miller Act bond. *McDaniel,* 512 F. 2d 583 (7th Cir. 1975). The Miller Act cause of action arises when the contractor has furnished a bond, and when the funds withheld pursuant to § 276a-2(b), if any, are exhausted. In *McDaniel,* it was undisputed that the contractor had not supplied a Miller Act bond, nor had the government withheld funds for payment of wage claims. In the case at bar, there has been no allegation or determination that a Miller Act bond exists or that funds were withheld from the contractor by the government. The Court needs to determine whether exhaustion of these remedies is a condition precedent to a cause of action on defendant's contract commitments unless it be shown that such remedies do, in fact, exist. The withholding of funds by the government is not mandatory under 40 U. S. C. § 276a-2(b). And, as pointed out in *McDaniel,* the Miller Act bond can be waived in certain circumstances. 40 U. S. C. § 270(e). There has been no claim that such waiver here would have been unauthorized, and the complaint does not suggest that plaintiff's claim is based on defendant's failure to provide a Miller Act bond. Thus the complaint cannot be dismissed on the grounds asserted by defendant in paragraph six of his motion.

Paragraphs seven and eight of defendant's motion charge that the Court cannot take jurisdiction over the claims of plaintiff's complaint for the reason that plaintiff fails to allege the requisite $10,000 damages for Federal jurisdiction and that the Court has no jurisdiction under § 1337. Defendant further asserts that, since the Court lacks jurisdiction over the Federal claims, it cannot assert pendent jurisdiction over the state claims.

These issues have already been disposed of by the Court. The Court recognizes defendant's claim of jurisdiction under 28 U. S. C. § 1337 for which no jurisdictional amount need

be alleged. Having asserted Federal jurisdiction over plaintiff's Count II, the Court has pendent jurisdiction of the claims in Counts III through VII. *United Mine Workers* v. *Gibbs,* 383 U. S. 715 (1966).

Therefore, defendant's motion to dismiss is granted as to Count I. The motion is denied as to Counts II through VII. The statute of limitations bars any cause of action of the named plaintiff which accrued prior to April 9, 1972. Those claims under Counts II, IV, V, VI and VII of the named plaintiff accruing between April 9, 1972 and April 9, 1973 are not dismissed but are subject to determinations at trial concerning the willfulness of the violations. Count III is subject only to the three-year statute of limitations.

Dated: October 8, 1975.

Enter:

/s/ Frank McGarr

APPENDIX C.

MEMORANDUM ORDER

This dispute arises out of a contract for the design, construction, and operation of the National Accelerator Laboratories, between defendant Universities Research Association, Inc. and the United States government acting through the Atomic Energy Commission and its successor, the Energy Research and Development Administration (hereinafter ERDA). Plaintiff Stanley Coutu filed this class action claiming that defendant failed to duly compensate plaintiff class for work it performed during the construction of the facility. The class has been certified and is described as follows:

> All "mechanics and/or laborers" employed by defendant pursuant to Contract No. AT(49-8)-3000 between defendant and the United States of America "for construction, alteration and/or repair, including painting and decorating, of public buildings and public works of the United States" who have been paid wages less than "the wages * * * determined by the Secretary of Labor to be prevailing for the various classes of laborers and mechanics * * * in the city, town, village, or other civil subdivision of the State" in which the work was performed, all as stated and defined in the Davis-Bacon Act, 40 U. S. C. § 276a, *et seq.*

Defendant is a not-for-profit consortium of universities formed for the purpose of facilitating scientific research and charged with the responsibility for design, procurement, and fabrication of the accelerator. Jurisdiction for Counts I and II of the complaint is invoked pursuant to 28 U. S. C. §§ 1331, 1337, and this court's pendent jurisdiction is invoked to entertain the remaining counts. This cause is before the court on defendant's motion for summary judgment.

Count I and II of plaintiff's complaint are the core federal claims contained in this suit. In Count I, plaintiff class purported to state a claim on the theory that defendant failed to compensate plaintiff class in accordance with the prevailing wage determinations made by the Secretary of Labor pursuant to the authorization of the Davis-Bacon Act, 40 U. S. C. § 279a, *et seq.*, whether or not the wage determinations were incorporated in the contract. This count was dismissed by the memorandum opinion and order filed by the Honorable Frank McGarr.

In Count II, plaintiff class alleges that the contract falls within the purview of the Davis-Bacon Act, and that the contract by its terms provides for "payment to members of plaintiff class at the legal wage rate applicable to work actually performed." Judge McGarr denied defendant's previous motion to dismiss this count on the ground that plaintiff stated a claim on which relief could be granted and over which the court had jurisdiction in accordance with *McDaniel* v. *University of Chicago,* 512 F. 2d 583 (7th Cir.), *vacated and remanded on other grounds,* 423 U. S. 810 (1975). Judge McGarr held that the contract did not preclude performance of Davis-Bacon work by defendant's employees pursuant to proper Davis-Bacon determinations by the contracting agency, ERDA, and the necessary modifications of the contract. [See Memorandum Opinion and Order at p. 8] Accordingly, plaintiff class was given "leave to show that the Secretary of Labor through ERDA has made Davis-Bacon Act determinations with respect to the alleged contract, and that plaintiff and the class have performed such work at defendant's direction, pursuant to the contract." [*Id.* at p. 10]

Defendant has filed a motion for summary judgment supported by the affidavit of John R. Frazier, Chief Legal Counsel for the Fermi National Accelerator Laboratory, claiming that there is no issue of material fact and defendant is entitled to judgment as a matter of law. Defendant asserts that the only contract between defendant and the United States government is

Contract No. EY-76-C-02-3000, as amended, formerly designated AT(49-8)-3000, and that "[n]o Davis-Bacon Act, 40 U. S. C. § 276a, *et seq.*, stipulations requiring the payment of prevailing wages have ever been made a part of or incorporated in said Contract . . ."[Affidavit of John R. Frazier, ¶ 3]

Plaintiff class has filed a memorandum in opposition to defendant's motion. Plaintiff class as much concedes that the contract fails to include Davis-Bacon specifications [Plaintiff's memorandum at 1-3], but it argues that this amounts to a violation of the act which should not serve to shield defendant from plaintiffs' implied right of action found in *McDaniel* v. *University of Chicago,* 512 F. 2d 588 (7th Cir.), *vacated and remanded,* 423 U. S. 810 (1975), *reaff'd,* 548 F. 2d 689 (7th Cir. 1977). Plaintiff class argues that the following contract language contemplated the likelihood that Davis-Bacon Act work would be performed.

> Article XXXIII—*Labor Provisions*
>
> 1. This contract does not contemplate the performance of work by the Association, with its own employees, which the Commission determines is subject to the Davis-Bacon Act. Such work, if any, performed under this contract shall be procured by subcontracts which shall be subject to the written approval of the Commission and contain the provisions relative to labor and wages required by law to be included in contracts for the construction, alteration, and/or repair, including painting and decorating, of a public building or public work.

Based on its interpretation of the contract clause, plaintiff class argues that there is a material issue of fact with regard to who performed the contemplated Davis-Bacon work for defendant over the years. Plaintiff class has offered no affidavit and has failed to point to any material adduced during discovery which would controvert the affidavit of John Frazier.

On the present state of the record it is clear that no Davis-Bacon Act determinations have been made a part of this con-

tract, requiring defendant to pay plaintiff class at wage rates contemplated by the Davis-Bacon Act. The only issue is whether plaintiff class can proceed in this action under the Davis-Bacon Act absent any showing that the government and defendant have made a determination that the contract is subject to the Act's provisions. An examination of the contract, the Act, and the relevant regulations reveals that defendant's motion for summary judgment must be granted. There is no issue of material fact and defendant is entitled to judgment on Count II as a matter of law. *See Rose* v. *Bridgeport Brass Co.*, 487 F. 2d 804, 808 (7th Cir. 1973).

The Davis-Bacon Act is essentially a minimum wage law which requires that "specifications for every contract in excess of $2,000, to which the United States . . . is a party, for construction, alteration, and/or repair . . . of public works of the United States . . . and which requires or involves the employment of mechanics and/or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics. . . ." 40 U. S. C § 276a. The Act is designed to protect employees of persons contracting with the government from sub-standard earnings. *United States* v. *Binghamton Construction Co.*, 347 U. S. 171 (1954). The determination of whether a contract is subject to the Act is made by the agency which is contracting on behalf of the United States government and the decision must be made in accordance with applicable regulations. 41 C. F. R. § 1-18.701-1, 1-18.701-2, 9-18.700(b). The contracting agency in this case has formal guidelines and a Davis-Bacon Committee for determining what work is subject to the Act. [Kennedy Dep. 42, 46-48, 75]. Any dispute regarding the application of the Act is referable to the Secretary of Labor for an authoritative ruling. 29 C. F. R. 5.12. The efficacy of the Act hinges on minimum wage determinations by the Secretary of Labor and the incorporation of minimum wage specifications in the contract. *See Walsh* v. *Schlecht*, 97 S. Ct. 679, 686 (1977); *United States* v. *Binghamton Construction Co.*, 347

U. S. 171, 172 (1954); *McDaniel* v. *University of Chicago, supra; North Georgia Bldg. & C. T. C.* v. *U. S. Dept. of Transportation,* 399 F. Supp. 58, 60-61 (N. D. Ga. 1975); 41 C. F. R. § 1-18.703-1 (1974).

After examination of the statutory and regulatory framework, it becomes clear that it would be improper for this court to declare in the first instance that this contract is now subject to the Davis-Bacon Act and to make appropriate wage determinations for the parties. *See Framlau Corporation* v. *Dembling,* 360 F. Supp. 806, 809 (E. D. Pa. 1973) and cases cited therein. This court concludes that there is no issue of material fact that this contract fails to contain the requisite Davis-Bacon Act specifications essential for maintenance of the claim stated in Count II. Accordingly, this court enters judgment for defendant on Count II of the complaint and that count is dismissed.

The court has examined the pendent counts raised in the complaint and due to the legally insubstantial nature of the federal claims raised in Counts I and II, the court, in the exercise of its discretion declines to assert jurisdiction over the claims raised therein. *See United Mine Workers of America* v. *Gibbs,* 383 U. S. 715 (1966); *Ohio Inns, Inc.* v. *Nye,* 542 F. 2d 673 (6th Cir. 1976), *cert. denied,* 45 U. S. L. W. 3651 (March 28, 1977); *McIlhenny* v. *American Title Ins. Co.,* 418 F. Supp. 364, 372 (E. D. Pa. 1976). Accordingly, this suit is dismissed in its entirety.

So ordered.

/s/ George N. Leighton
George N. Leighton,
United States District Judge

Dated: November 29, 1977

APPENDIX D.

§ 276a. RATE OF WAGES FOR LABORERS AND MECHANICS

(a) The advertised specifications for every contract in excess of $2,000, to which the United States or the District of Columbia is a party, for construction, alteration, and/or repair, including painting and decorating, of public buildings or public works of the United States or the District of Columbia within the geographical limits of the States of the Union, or the District of Columbia, and which requires or involves the employment of mechanics and/or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village, or other civil subdivision of the State, in which the work is to be performed, or in the District of Columbia if the work is to be performed there; and every contract based upon these specifications shall contain a stipulation that the contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work, unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at time of payment, computed at wage rates not less than those stated in the advertised specifications, regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and such laborers and mechanics, and that the scale of wages to be paid shall be posted by the contractor in a prominent and easily accessible place at the site of the work; and the further stipulation that there may be withheld from the contractor so much of accrued payments as

may be considered necessary by the contracting officer to pay to laborers and mechanics employed by the contractor or any subcontractors on the work the difference between the rates of wages required by the contract to be paid laborers and mechanics on the work and the rates of wages received by such laborers and mechanics and not refunded to the contractor, subcontractors, or their agents.

(b) As used in sections 276a to 276a—5 of this title the term "wages", "scale of wages", "wage rates", "minimum wages", and "prevailing wages" shall include—

(1) the basic hourly rate of pay; and

(2) the amount of—

(A) the rate of contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a fund, plan, or program; and

(B) the rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing benefits to laborers and mechanics pursuant to an enforcible commitment to carry out a financially responsible plan or program which was communicated in writing to the laborers and mechanics affected,

for medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, for unemployment benefits, life insurance, disability and sickness insurance, or accident insurance, for vacation and holiday pay, for defraying costs of apprenticeship or other similar programs, or for other bona fide fringe benefits, but only where the contractor or subcontractor is not required by other Federal, State, or local law to provide any such benefits:

Provided, That the obligation of a contractor or subcontractor to make payment in accordance with the prevailing wage deter-

minations of the Secretary of Labor, insofar as sections 276a to 276a—5 of this title and other Acts incorporating sections 276a to 276a—5 of this title by reference are concerned may be discharged by the making of payments in cash, by the making of contributions of a type referred to in paragraph (2)(A), or by the assumption of an enforcible commitment to bear the costs of a plan or program of a type referred to in paragraph (2)(B), or any combination thereof, where the aggregate of any such payments, contributions, and costs is not less than the rate of pay described in paragraph (1) plus the amount referred to in paragraph (2).

In determining the overtime pay to which the laborer or mechanic is entitled under any Federal law, his regular or basic hourly rate of pay (or other alternative rate upon which premium rate of overtime compensation is computed) shall be deemed to be the rate computed under paragraph (1), except that where the amount of payments, contributions, or costs incurred with respect to him exceeds the prevailing wage applicable to him under section 276a to 276a—5 of this title, such regular or basic hourly rate of pay (or such other alternative rate) shall be arrived at by deducting from the amount of payments, contributions, or costs actually incurred with respect to him, the amount of contributions or costs of the types described in paragraph (2) actually incurred with respect to him, or the amount determined under paragraph (2) but not actually paid, whichever amount is the greater.

§ 276a—1. TERMINATION OF WORK ON FAILURE TO PAY AGREED WAGES; COMPLETION OF WORK BY GOVERNMENT

Every contract within the scope of sections 276a to 276a—5 of this title shall contain the further provision that in the event it is found by the contracting officer that any laborer or mechanic employed by the contractor or any subcontractor directly on the site of the work covered by the contract has been or is being paid a rate of wages less than the rate of wages required by the

contract to be paid as aforesaid, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been a failure to pay said required wages and to prosecute the work to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess costs occasioned the Government thereby.

§ 276a—2. PAYMENT OF WAGES BY COMPTROLLER GENERAL FROM WITHHELD PAYMENTS; LISTING CONTRACTORS VIOLATING CONTRACTS

(a) The Comptroller General of the United States is authorized and directed to pay directly to laborers and mechanics from any accrued payments withheld under the terms of the contract any wages found to be due laborers and mechanics pursuant to sections 276a to 276a—5 of this title; and the Comptroller General of the United States is further authorized and is directed to distribute a list to all departments of the Government giving the names of persons or firms whom he has found to have disregarded their obligations to employees and subcontractors. No contract shall be awarded to the persons or firms appearing on this list or to any firm, corporation, partnership, or association in which such persons or firms have an interest until three years have elapsed from the date of publication of the list containing the names of such persons or firms.

(b) If the accrued payments withheld under the terms of the contract, as aforesaid, are insufficient to reimburse all the laborers and mechanics, with respect to whom there has been a failure to pay the wages required pursuant to sections 276a to 276a—5 of this title, such laborers and mechanics shall have the right of action and/or of intervention against the contractor and his sureties conferred by law upon persons furnishing labor or materials, and in such proceedings it shall be no defense that such laborers and mechanics accepted or agreed to accept less than the required rate of wages of voluntarily made refunds.

§ 276a—3. Effect on Other Federal Laws

Sections 276a to 276a—5 of this title shall not be construed to supersede or impair any authority otherwise granted by Federal law to provide for the establishment of specific wage rates.

§ 276a—4. Effective Date of Sections 276a to 276a—5

days after August 30, 1935, but shall not affect any contract then existing or any contract that may thereafter be entered into pursuant to invitations for bids that are outstanding on August 30, 1935.

§276a—5. Suspension of Sections 276a to 276a—5 During Emergency

In the event of a national emergency the President is authorized to suspend the provisions of sections 276a to 276a—5 of this title.

§ 276a—6. Appropriation

§ 276a—7. Application of Sections 276a to 276a—5 to Contracts Entered Into Without Regard to Section 5 of Title 41

The fact that any contract authorized by any Act is entered into without regard to section 5 of Title 41, or upon a cost-plus-a-fixed-fee basis or otherwise without advertising for proposals, shall not be construed to render inapplicable the provisions of sections 276a to 276a—5 of this title, if such Act would otherwise be applicable to such contract.

§ 276c. Regulations Governing Contractors and Subcontractors

The Secretary of Labor shall make reasonable regulations for contractors and subcontractors engaged in the construction, prosecution, completion or repair of public buildings, public

works or buildings or works financed in whole or in part by loans or grants from the United States, including a provision that each contractor and subcontractor shall furnish weekly a statement with respect to the wages paid each employee during the preceding week. Section 1001 of Title 18 shall apply to such statements.

No. 78-1945

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

UNIVERSITIES RESEARCH ASSOCIATION, INC.,
Petitioner,

vs.

STANLEY E. COUTU, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOINT APPENDIX.

ROBERT E. MANN
SEYFARTH, SHAW, FAIRWEATHER & GERALDSON
Suite 4200
55 East Monroe Street
Chicago, Illinois 60603
Attorney for Petitioner

HUGH B. ARNOLD
DANIEL N. KADJAN
ARNOLD and KADJAN
11 South LaSalle Street
Chicago, Illinois 60603

ROBERT JAY NYE
NYE and NYE
420 North Euclid Avenue
Oak Park, Illinois 60302
Attorneys for Respondent

PETITION FOR CERTIORARI FILED JUNE 30, 1979
CERTIORARI GRANTED MARCH 17, 1980

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Date	Proceedings
4– 9–75	Complaint filed as Case No. 75 C 1129, U. S. District Court, Northern District of Illinois, Eastern Division; 29 U. S. C. § 256(a) consent filed for Stanley E. Coutu
6– 5–75	Defendant's Motion to Dismiss Complaint, filed
10– 8–75	Memorandum Opinion and Order of the District Court, Dismissing Count I of the Complaint, filed
11–10–75	Answer to Remaining Counts, filed
2– 6–76	Deposition of Coutu, filed
2–18–76	Deposition of Kennedy, filed
8– 4–76	Class Action Certification Order, filed
9– 9–76	Deposition of Orr, filed
1–13–77	Deposition of Carrigan, filed
1–13–77	Deposition of McCook, filed
1–31–77	Deposition of Peoples, filed
1–31–77	Deposition of Huson, filed
12–12–77	Deposition of Marofske, filed
2–18–77	Pre-trial Conference; briefing schedule set for Summary Judgment Motion to resolve legal issues
3–18–77	Motion for Summary Judgment, filed
11–29–77	Memorandum Opinion and Order Granting Defendant's Motion for Summary Judgment, filed

12–28–77	Notice of Appeal, filed
12– 6–78	Oral Argument before the Court of Appeals for the Seventh Circuit
4– 4–79	Decision of the Court of Appeals, filed
5– 3–79	Stay of Mandate issued
6– 1–79	Stay of Mandate, extended
6–30–79	Petition for Writ of Certiorari Docketed
11– 5–79	Solicitor General invited to file a brief expressing views of the United States
3–17–80	Petition for Writ of Certiorari, granted

STANLEY E. COUTU,

Plaintiff,

vs.

UNIVERSITIES RESEARCH ASSOCIATION, INC.,

Defendant.

COMPLAINT

This is a class action for compensatory damages, and other appropriate relief, resulting from certain practices in payment of wages by defendants to members of plaintiff's class.

FIRST CAUSE OF ACTION

For A First Cause Of Action, Plaintiff And The Class Allege:

I

This action arises under one or more laws regulating Interstate Commerce, and jurisdiction of this action is predicated upon 28 United States Code, Sections 1331 and 1337, among others, and under the Davis-Bacon Act, Title 40 United States Code, Section 276a, as hereinafter more fully appears.

II

The named defendants are contractors in a contract to which the United States is a party. The said contract is for an amount in excess of $2,000.00, is sometimes known as Contract No. AT(49-8)-3000, and provides among other things for construction, alteration and/or repair of public buildings or public works of the United States at the facility known as the National Accelerator Laboratories, and requires or involves the employment of mechanics and/or laborers. The named defendants have the original or copies of the said contract.

III

The named defendants have failed to pay to members of plaintiff's class the minimum wages required to be paid pursuant to the said contract and the prevailing wage determinations of the Secretary of Labor and the Davis-Bacon Act (Title 40, United States Code, Section 276a *et seq.*), as is more fully described below.

IV

The defendants have, pursuant to the said contract, employed each of the plaintiffs in the performance of labor for the construction, alteration, and/or repair of public buildings and public works of the United States. Further, and notwithstanding the existence of determinations by the Secretary of Labor of prevailing wages for corresponding labor on projects of a character similar to the said contract work, the defendants have paid the plaintiffs wages and wage rates substantially lower than specified in such prevailing wage determinations. The total of the minimum wages which have been withheld from plaintiffs in the manner so specified, and the damage to plaintiffs thereby is in excess of Five Million Dollars ($5,000,000.00).

V

This action is brought on behalf of the named plaintiff, individually, and as a representative of all persons similarly situated. The class of plaintiffs consists of the following ascertainable members:

1. All members of the class are mechanics and/or laborers employed by defendants, pursuant to the said contract, for construction, alteration, and/or repair of public buildings or public works of the United States, and who have been illegally and wrongfully deprived of the minimum wages and wage rates required to be paid pursuant to the said contract and the prevailing wage determinations of the Secretary of Labor and the Davis-Bacon Act.

2. The names and addresses of all members of the class can be ascertained from the business records of the defendants.

3. Defendants' class consists of all named defendants paying or causing to be paid the herein described wrongful and illegal wages and wage rates to the plaintiff and members of plaintiff's class.

VI

A community of interest exists in the plaintiff class on whose behalf this action was instituted and against the defendant class against whom this action is prosecuted for the following reasons:

1. All members of the class are similarly situated as shown in Paragraph V above. The only significant difference between members is the amount which is owed to each, which amount can be determined either by simple mathematical calculations or from defendants' business records.

2. All members of the class have a virtually identical interest in having the court determine the legal questions of the validity of the defendants' wage payment practice.

The following policy considerations unite plaintiff and all members of the class, including the class of defendants:

1. The members of the class are too numerous to bring each and every member before the court as individual parties.

2. Proof of a common or single state of law will establish the right of each member to recover damages for the wrong inflicted upon them. Proof of a common state of facts will establish the amount which each member of the class is owed because of the wrong inflicted upon them.

3. Were a class action to be denied here, a multiplicity of suits dealing with an identical legal question would be required to give a remedy to the plaintiffs in the class

wronged by defendants' actions. A single adjudication will, on the other hand, be determinative of the interests of all members of the class and prevent inconsistent adjudications, which would establish incompatible standards of conduct for the defendants.

4. Individual actions by each member of plaintiff's class are not practical since the total dollar amount arising from such wrong perpetrated against each such member is frequently smaller than would permit the retaining of separate counsel and the prosecution of such claim.

5. Individual actions are further impractical since at this time few members of plaintiff's class are aware of the wrong done, and unless they are generally made aware of the wrong, few would seek redress.

6. The claims of the named plaintiffs are representative of the claims of all members of the class and the representative party will fairly and adequately protect the interest of the class.

7. A class action is superior to other available methods for the fair and efficient adjudication of the controversy.

SECOND CAUSE OF ACTION

For A Second Cause Of Action, Plaintiff And The Class Allege:

I

Plaintiff refers to and incorporates by reference, as though set forth in full herein, Paragraphs I, II, III, IV, V, VI and VII of the plaintiff's First Cause of Action.

II

The contract pursuant to which the plaintiffs have been so employed, itself provides for payment to members of the plaintiff class at the legal wage rate applicable to the work actually

performed. The defendants have failed to make such payments as required by the said contract and have breached their contractual obligations to the members of plaintiff class. By reason of such breach of contract, the defendants have deprived plaintiffs of substantial amounts, to plaintiffs' damage in excess of $5,000,000.00.

THIRD CAUSE OF ACTION

For A Third Cause Of Action, Plaintiff And The Class Allege:

I

This action derives from a nucleus of operative fact common with the First Cause of Action, and is pendent thereto. Plaintiff and the class incorporate herein by reference all of the allegations of Paragraphs I through VII, inclusive, of the First Cause of Action.

II

On various dates which are reflected in defendants' business records, defendants made improper wage payments as alleged above, and defendants have failed to disclose to plaintiffs the nature and amount of the said underpayments or to account to plaintiffs for the amounts so withheld, and have represented that the wages and wage rates paid to the members of plaintiff class were valid and proper.

III

Defendants knew that the underpayments were wrongful and nevertheless have failed to disclose to plaintiff and the class the true nature and amount of the said underpayments, and have knowingly failed to account to the plaintiff class and have knowingly concealed said underpayments and falsely represented the facts concerning the impropriety of the wages and wage rates actually paid.

IV

By said practice and failure to disclose and representations, defendants intended to and did defraud the plaintiff class by unjustly depriving them of their proper wages and wage rates.

V

Plaintiff and the class were unaware of the wrong done them and in accepting wages tendered by defendants reasonably relied on the representations made by the defendants.

VI

In or about June, 1973, the named plaintiff discovered the fraud.

VII

As a result of the foregoing, defendants acted maliciously, oppressively, and were guilty of wanton disregard of the rights of plaintiff and the class, and by reason thereof, plaintiff and the class demand punitive damages in reasonable amount, for the purpose of making an example, and for the purpose of preventing further such actions on the part of defendants and their class. Plaintiff and the class believe that said reasonable amount would be measured by the sum of three times the amount of the underpayment, and believe said amount to be in excess of $15,000,000.00.

FOURTH CAUSE OF ACTION

For A Fourth Cause Of Action, Plaintiff And The Class Allege:

I

This action derives from a nucleus of operative fact common with the First Cause of Action, and is pendent thereto. Plaintiff and the class incorporated herein by reference all of the

allegations contested in paragraphs I through VII, inclusive, of the First Cause of Action.

II

Within five years last past, within this jurisdiction, defendants became indebted to plaintiff and the class for money had and received by defendants for the use and benefit of plaintiff and the class, in an amount equal to the amount of the wage underpayments alleged above.

III

That no part of said sum has been paid, although demand therefor has been made, and there is now due, owing and unpaid a sum in excess of $5,000,000.00, with interest thereon at the legal rate of interest per annum from the date said money was had and received for the use and benefit of defendants.

FIFTH CAUSE OF ACTION

For A Fifth Cause Of Action, Plaintiff And The Class Allege:

I

This action derives from a nucleus of operative fact common with the First Cause of Action, and is pendent thereto. Plaintiff and the class incorporate herein by reference all of the allegations of Paragraphs I through VII, inclusive, of the First Cause of Action.

II

Within five years last past, defendants rendered to plaintiff and the class an account or accounts in writing, commonly known as wage statements, purporting to show the balances due from defendants to plaintiff and the class for labor performed pursuant to the said contract.

III

Plaintiff and the class, reasonably relying on said statements of account and believing said statements to be correct, received the amounts appearing on the said statement or statements.

IV

Subsequent to the making of said payments, plaintiff and the class discovered that said accounts were not correctly stated, but were in fact understated by the failure to include therein the proper wages and wage rates required to be paid them pursuant to the said contract and the law. Plaintiff and the class are informed and believe and therefore allege that the total underpayment to plaintiff and the class was in excess of $5,000,000.00.

V

Plaintiff and the class demanded of defendants that defendants pay and make restitution to plaintiff and the class for the amount of the said wage underpayments, but defendants have retained said amounts and have failed, neglected and refused to pay same to plaintiff and the class, and no part thereof has been paid.

SIXTH CAUSE OF ACTION

For A Sixth Cause Of Action, Plaintiff And The Class Allege:

I

This action derives from a nucleus of operative fact common with the First Cause of Action, and is pendent thereto. Plaintiff and the class incorporate herein by reference all of the allegations of Paragraphs I through VII, inclusive, of the First Cause of Action.

II

Within five years last past, in this jurisdiction, defendants became indebted to plaintiff and the class in an open book account for money due in a sum which plaintiff and the class are informed is in excess of $5,000,000.00, unpaid to plaintiff and the class by defendants for labor performed pursuant to the said contract at the special instance and request of defendants, and which sum defendants are obligated to pay over to plaintiff and the class.

III

No part of said sum has been paid although demand therefor has been made, and there is now due, owing and unpaid a sum in excess of $5,000,000.00, with interest thereon at the legal rate of interest per annum, from the date said sum became due from defendants to plaintiff and the class.

SEVENTH CAUSE OF ACTION

For A Seventh Cause Of Action, Plaintiff And The Class Allege:

I

This action derives from a nucleus of operative fact common with the First Cause of Action, and is pendent thereto. Plaintiff and the class incorporate herein by reference all of the allegations of Paragraphs I through VII, inclusive, of the First Cause of Action.

II

Within five years last past, in this jurisdiction, defendants became indebted to plaintiff and the class on and pursuant to written contract or other evidences of indebtedness in writing, for money due in a sum which plaintiff and the class are informed is in excess of $5,000,000.00, unpaid to plaintiff and the class by defendants for labor performed pursuant to the said contract at

the special instance and request of defendants, and which sum defendants are obligated to pay over to plaintiff and the class.

III

No part of said sum has been paid although demand therefor has been made, and there is now due, owing and unpaid a sum in excess of $5,000,000.00, with interest thereon at the legal rate of interest per annum, from the date said sum became due from defendants to plaintiff and the class.

AD DAMNUM

Wherefore, plaintiff and the class request Orders and Judgments granting them relief as follows:

1. An accounting;
2. Damages in such amounts as conform to the proof;
3. Punitive damages;
4. Interest at the legal rate of interest per annum;
5. Reasonable attorneys' fees;
6. Cost and expenses of suit;
7. Injunctive relief;
8. Declaratory relief;
9. Such other relief, whether legal or equitable or otherwise, as is just.

ANSWER

Defendant, Universities Research Association, Inc., a not-for-profit incorporated consortium of Universities under contract with the United States to administer the Fermi National Accelerator Laboratory, by its attorneys Seyfarth, Shaw, Fairweather & Geraldson, answers the Complaint as follows:

FIRST DEFENSE

I. Answer To First Cause Of Action Alleged.

The first cause of action alleged in the Complaint was dismissed by order of this Court dated October 8, 1975, and therefore requires no answer.

II. Answer To Second Cause Of Action Alleged.

1. (a) Defendant denies each and every allegation set forth in Paragraph I of the dismissed First Cause of Action as incorporated by reference into Paragraph I of the Second Cause of Action.

(b) Defendant admits the allegations set forth in Paragraph II of the dismissed First Cause of Action as incorporated by reference into Paragraph I of the Second Cause of Action (with the exception that the proper name of the referred to facility is Fermi National Accelerator Laboratory). Defendant states that the contract referred to therein also sets forth expressly schedules of compensation for employees of Defendant, and establishes procedures and controls whereby said schedules are funded by monies supplied directly by the United States for that purpose.

(c) Defendant denies that it has failed to pay wages pursuant to the schedules approved by the United States and set forth in said contract; Defendant admits that it has not paid wages to its employees pursuant to any schedules other than those set forth in the contract and approved by the United States; Defendant states

that the U. S. Secretary of Labor has made no wage determinations relevant to said contract, and that the United States has determined that 40 U. S. C. § 276(a) is not applicable to the referenced contract, insofar as Defendant's employees are concerned; and Defendant denies each and every other allegation set forth in Paragraph III of the dismissed First Cause of Action as incorporated by reference into Paragraph I of the Second Cause of Action.

(d) Defendant admits that it has not paid Plaintiff pursuant to alleged determinations and/or schedules set by the Secretary of Labor; Defendant states that it has not paid Plaintiff pursuant to such determination for the reason that no such determinations have been made relative to Plaintiff's work and for the further reason that the United States, which supplies the monies to pay Plaintiff, has determined and directed that Plaintiff be paid pursuant to schedules approved by the United States and set forth in the contract; and Defendant denies each and every other allegation set forth in Paragraph IV of the dismissed First Cause of Action as incorporated by reference into Paragraph I of the Second Cause of Action.

(e) Defendant admits that the names and addresses of its employees may be ascertained from its records; Defendant denies the existence of any "class" and denies each and every other allegation set forth in Paragraphs V, VI and VII of the dismissed First Cause of Action as incorporated by reference into Paragraph I of the Second Cause of Action.

2. Defendant denies each and every allegation set forth in Paragraph II of the Second Cause of Action alleged.

III. Answer To Third Cause Of Action Alleged.

1. Defendant here incorporates by reference its answers to the allegations set forth in Paragraph I of the Second Cause of Action alleged, in answer to the allegations set forth in Paragraph I of the Third Cause of Action alleged.

2. Defendant denies making any improper wage payments, or underpayments, denies that any wage payments made were

wrongful or falsely represented, denies that any fraud occurred in relation to wage payments or representations with respect thereto, and denies each and every other allegation set forth inclusive, in the Third Cause of Action alleged.

IV. Answer To Fourth Cause Of Action Alleged.

1. Defendant here incorporates by reference its answers to the allegations set forth in Paragraph I of the Second Cause of Action alleged, in answer to the allegations set forth in Paragraph I of the Fourth Cause of Action alleged.

2. Defendant denies any underpayment of wages and denies each and every other allegation set forth in the Fourth Cause of Action alleged.

3. Defendant states, in further answer to the Fourth Cause of Action alleged:

a) that it is a not-for-profit entity;

b) that all monies required for wage payments to persons employed by it are supplied directly by the United States;

c) that the United States supplies, for said wage payments, monies strictly limited in amount to that required by wage and benefit schedules previously approved by the United States;

d) that the United States regularly audits said payments to ensure conformity with said schedules;

e) that Defendant does not now receive and never has received for its own use, any monies from the United States computed with respect to, or otherwise related to, employee wage payments;

f) that any monies the United States does not supply for payment of wages in conformity to the aforesaid schedules, or for payment to Defendant in relation to Defendant's own expenses of administration (said ex-

penses of administration being expressly agreed to by the United States, regularly audited, and wholly unrelated to employee wage payments), or used for purchase of materials, supplies and subcontracts, approved by the United States, are retained by and for the use of the United States.

V. Answer To Fifth Cause Of Action Alleged.

1. Defendant here incorporates by reference its answers to the allegations set forth in Paragraph I of the Second Cause of Action alleged, in answer to the allegations set forth in Paragraph I of the Fifth Cause of Action alleged.

2. Defendant admits the allegations set forth in Paragraphs II and III of the Fifth Cause of Action alleged.

3. Defendant denies that any "wage statements of account" as alleged in Paragraphs II, III and IV, were incorrect and therefore Defendant denies each and every allegation set forth in Paragraph V of the Fifth Cause of Action alleged.

4. Defendant denies that Plaintiff, or any member of the putative "class" received underpaid wages or demanded wages different from those received for work performed and Defendant therefore denies each and every allegation set forth in Paragraph V of the Fifth Cause of Action alleged.

VI. Answer To Sixth Cause Of Action Alleged.

1. Defendant here incorporates by reference its answers to allegations set forth in Paragraph I of the Second Cause of Action alleged, in answer to the allegations set forth in Paragraph I of the Sixth Cause of Action alleged.

2. Defendant denies each and every allegation set forth in Paragraphs II and III of the Sixth Cause of Action alleged.

VII. Answer To Seventh Cause Of Action Alleged.

1. Defendant here incorporates by references its answers to the allegations set forth in Paragraph I of the Second Cause of

Action alleged, in answer to the allegations set forth in Paragraph I of the Seventh Cause of Action alleged.

2. Defendant denies each and every allegation set forth in Paragraphs II and III of the Seventh Cause of Action alleged.

SECOND DEFENSE

The Court lacks jurisdiction over the subject matter of the Complaint and/or the Complaint fails to state a claim upon which relief may be granted by reason of Plaintiff's failure to prosecute his claim pursuant to the provisions of 40 U. S. C. § 270a-d in the name of the United States, or under the provisions of 40 U. S. C. § 276a-2(b), those statutory remedies being the exclusive means to assert claims based upon 40 U. S. C. § 276(a), the substantive jurisdictional statute alleged in the Complaint. *University of Chicago and Argonne* v. *McDaniel*, ... U. S. ....., 44 LW 3181 (October 6, 1975).

THIRD DEFENSE

The Complaint fails to state a claim upon which relief may be granted by reason of Plaintiff's failure to allege a contract to which Defendant is a party, which contains the provisions, or determinations, referred to in 40 U. S. C. § 276(a), and pursuant to which Plaintiff performed work.

FOURTH DEFENSE

The Court lacks jurisdiction over the subject matter of the Complaint and/or the Complaint fails to state a claim upon which relief may be granted by reason of the facts that:

1. Plaintiff, at all times relevant, performed work pursuant to a contract between the United States and Defendant.

2. Said contract included provisions and schedules setting forth the rates of Plaintiff's compensation.

3. Said contract affirmatively recites that it is not subject to 40 U. S. C. § 276(a).

4. The United States has, at all times relevant:

a) supplied for payment to Plaintiff monies limited in amount to those required by the aforesaid compensation rate schedules approval by it and no more; and

b) audited, on a regular basis, records showing payments to Plaintiff to ensure conformity to the aforesaid schedules.

5. Defendant is entitled as a matter of law to rely upon its contract with the United States as being the sole expression of Defendant's obligation to compensate Plaintiff.

FIFTH DEFENSE

The Court lacks jurisdiction over the subject matter of the Complaint and/or the Complaint fails to state a claim upon which relief may be granted by reason of Plaintiff's failure to allege prior exhaustion of administrative remedies provided by the United States, through the contracting agency (Energy Research Development Administration), the U. S. Department of Labor, and the Comptroller General.

SIXTH DEFENSE

The Court lacks jurisdiction with respect to any matter raised in the Complaint and relating to events or transactions which occurred prior to April 9, 1973, or, as to any claimant who has not yet filed a consent as required by the Portal-to-Portal Act, 29 U. S. C. § 255, *et seq.* prior to two years preceding the date of such filing, under the applicable statute of limitations, § 6 of the Portal-to-Portal Act, 29 U. S. C. § 255.

SEVENTH DEFENSE

The Complaint fails to state a claim upon which relief can be granted as to the purported "class" by reason of Plaintiff's failure to allege a valid class action under Rule 23 of the Federal Rules of Civil Procedure because:

a) the purported class is vague, indefinite and not reasonably identifiable; and

b) there are questions of law and fact bearing upon application of the Davis-Bacon Act to specific work assignments not common within the purported class.

EIGHTH DEFENSE

The Complaint should be dismissed on the ground that the Court lacks jurisdiction over the Complaint, and specifically its alleged Clauses of Action Second through Seventh, they being pendent to an alleged federal cause of action over which this Court lacks jurisdiction and which fails to state a claim upon which relief may be granted.

NINTH DEFENSE

The Court lacks jurisdiction over the subject matter of the Complaint and/or the Complaint fails to state a claim upon which relief can be granted because the matter in controversy does not exceed the sum or value of $10,000, exclusive of interests and costs; and does not arise under the Constitution or laws of the United States within the meaning of 28 U. S. C. §§ 1331, or 1337.

Wherefore, Defendant prays that the Complaint be dismissed, in its entirety, with prejudice, and with costs awarded to Defendant together with such other relief as the Court shall deem just.

MEMORANDUM OPINION AND ORDER

This is an action brought on behalf of the named plaintiff, Stanley Coutu, individually and as a representative of all persons similarly situated, seeking relief from certain practices in payment of wages by defendant to members of plaintiff's class. The complaint alleges seven causes of action, the first of which is based on the defendant's violation of the provisions of the Davis-Bacon Act, 40 U. S. C. § 276(a). The second cause of action alleges a breach of defendant's contractual obligations to plaintiff and the class under the Davis-Bacon Act contract set forth in the first cause of action and incorporated by reference in the remaining causes of action. Jurisdiction is predicated on 28 U. S. C. §§ 1331 and 1337, and under the Davis-Bacon Act, 40 U. S. C. § 276(a). The remaining causes of action are based on common law counts for fraud, restitution, and payment of indebtedness on account and contract. Jurisdiction is predicated on the allegation that each cause of action derives from a nucleus of operative fact common with the first cause of action, and is pendent thereto.

Leave to proceed on behalf of the class alleged has not been granted.

Defendant has moved for dismissal of plaintiff's complaint for any or all of eight reasons; the first three of which revolve around the same issue and will be treated collectively.

1. Defendant first moves for dismissal for the reason that this Court lacks jurisdiction over the subject matter of the complaint and/or the complaint fails to state a claim upon which relief can be granted, by reason of the plaintiff's failure to allege prior exhaustion of administrative procedures.

2. In the alternative, defendant urges the Court to defer, under the doctrine of Primary Jurisdiction, to administrative resolution of issues relating to application of the Davis-Bacon Act to work alleged under the sued-upon contract.

3. Furthermore, asserts defendant, the complaint fails to state a claim upon which relief can be granted and the Court lacks jurisdiction over the subject matter of the complaint, by reason of the absence of any allegations of determinations by the Atomic Energy Commission (now U. S. Energy and Research Development Administration, hereinafter referred to as ERDA), or by the Secretary of Labor, specifying that compensation is to be paid for work performed under the contract different than the rates of compensation actually set forth therein and approved by the United States through ERDA, or that defendant has not in fact compensated employees in accord with the rates specified in the contract as approved by the United States through ERDA.

The defendant in its memorandum in support of its motion to dismiss has summarized the issues raised in paragraphs 1, 2 and 3 of its motion as follows: whether this Court has jurisdiction as a matter of law, or should as a matter of policy undertake to review, revoke or overrule, retroactively, determinations made by the agents of the United States government in the contract in question.

In his complaint, plaintiff has alleged a contract between the defendant and the United States for an amount in excess of $2,000 which provides for, among other things, construction, alteration and repair of public buildings or public works of the United States. Plaintiff has alleged that this contract requires or involves the employment of mechanics and laborers, and has further alleged that he and all the members of his class are mechanics and laborers employed by defendant pursuant to the said contract. The contract which plaintiff alleges exists between defendant and the United States is commonly referred to as Contract No. AT (49-8)-3000, a copy of which has been submitted to this Court by defendant.

In Paragraphs III and IV of what plaintiff labels his first cause of action, plaintiff alleges that the defendant has failed to pay to members of plaintiff's class the minimum wages required

to be paid pursuant to the said contract and the prevailing wage determinations of the Secretary of Labor and the Davis-Bacon Act, 40 U. S. C. § 276a, *et seq.* This allegation contradicts the reasons which defendant cites for dismissal in the third paragraph of his motion. However, this allegation is not totally borne out by the alleged Contract No. AT (49-8)-3000.

Though the contract contains wage provisions, it does not contain the standard provisions found in a Davis-Bacon contract. 41 C. F. R. § 1-18.703-1. And as defendant has pointed out in the memorandum in support of its motion, the contract contains a clause in the labor provisions section which reads as follows:

> Article XXXIII—*Labor Provisions*
>
> 1. This contract does not contemplate the performance of work by the Association (defendant herein), with its own employees, which the Commission determines is subject to the Davis-Bacon Act. Such work, if any, performed under this contract shall be procured by subcontracts which shall be subject to the written approval of the Commission (i.e., ERDA)....
>
> (Contract AT (49-8)-3000, p. 54)

The defendant relies on the above contract provision and the absence of standard Davis-Bacon Act provisions to support its position that the contract in question is not a Davis-Bacon Act contract. From this position, defendant reasons that plaintiff has no cause of action pursuant to the contract upon which plaintiff can possibly base a claim for relief or over which the Court can take jurisdiction.

The defendant in its memorandum has soundly argued the position that the administrative determinations of the contracting agency are subject only to review by the Secretary of Labor, for purposes of an authoritative ruling (29 C. F. R. 5.12), and in certain instances are appealable to the Wage and Appeals Board of the U. S. Department of Labor. 29 C. F. R. 5.11; 41 C. F. R.

7.10. Extrapolating on this position, defendant asserts that for this Court to take jurisdiction over plaintiff's alleged cause of action would be for the Court to subject the determinations of the Secretary of Labor to judicial review. This, the defendant asserts, the Court may not do, citing *United States* v. *Binghamton Construction Co., Inc.*, 347 U. S. 171, 74 S. Ct. 438 (1954) and *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 60 S. Ct. 869 (1940).

The plaintiff, in response to defendant's motion to dismiss and memorandum in support thereof, relies exclusively on the recent Seventh Circuit decision in *McDaniel* v. *University of Chicago*, 512 F. 2d 583 (7th Cir. 1975).

In *McDaniel*, the Court had before it a complaint containing allegations almost identical to those in the case at bar. The District Court concluded that the Davis-Bacon Act did not confer a right of action against the contractor, cognizable in Federal Court, under the circumstances alleged in the complaint. On appeal, the Circuit Court agreed that § 276a-2(b) of the Davis-Bacon Act did not create a cause of action, cognizable in Federal Court, for one in plaintiff's position; the Court did conclude, however, that "[W]age-earners have or may have rights of action under the contractual provisions required by § 276a which may be enforced in State Court actions or Federal Court actions where jurisdiction is properly based." *McDaniel*, 512 F. 2d 583, 586. The Court discussed the constitutional basis of the Davis-Bacon Act, finding the Act to be significantly based on the commerce clause. The Court therefore concluded that ". . . [P]laintiff's complaint, in that it sought to enforce defendant's contractual commitment to pay 'prevailing' wages as determined by the Secretary of Labor, stated a cause of action under the Davis-Bacon Act for which relief could be granted and that subject matter jurisdiction was properly based upon 28 U. S. C. § 1337." *McDaniel*, 512 F. 2d 583, 588.

Defendant has attempted to distinguish *McDaniel* on the grounds that in *McDaniel*, there was no question but that the

contract involved was a Davis-Bacon contract, while in the case at bar defendant asserts that the contract in question specifically excludes Davis-Bacon Act work. If true, plaintiff's reliance on *McDaniel* would surely be misplaced.

However, the purpose of a motion to dismiss is to test the legal sufficiency of the allegations of the complaint. 2A Moore's Federal Practice, 2265, 2266. The plaintiff herein has properly alleged a Davis-Bacon Act contract in his complaint, the only difficulty being that the specific contract which plaintiff alleges, Contract No. AT (49-8)-3000, does not bear out all of plaintiff's allegations. It does not, however, conclusively foreclose the possibility that plaintiff has stated a claim upon which relief may be granted.

Defendant relies on the contract clause taken from the labor provisions of the contract (quoted above) for its position that the contract does not contemplate the performance of Davis-Bacon work by defendant's employees. This clause, however, does not preclude the possibility of performance of Davis-Bacon Act work pursuant to the contract, albeit by someone other than defendant's employees. Furthermore, the Court is apprised of a correspondence between the defendant and the United States Atomic Energy Commission (ERDA) dated April 6, 1972, which has seemingly been incorporated into the alleged contract. This correspondence leaves open the possibility of performance of Davis-Bacon Act work by defendant's employees pursuant to proper Davis-Bacon determinations by ERDA with regard to the work to be performed, and pursuant to appropriate modification of the contract to incorporate the necessary provisions relative to wages and labor.

The Court is thus presented with factual considerations as to the existence of Davis-Bacon Act determinations by ERDA pursuant to the contract, and as to performance of Davis-Bacon Act work, properly or improperly assigned to plaintiff and the class by defendant, as alleged by plaintiff. This Court cannot make factual determinations on a motion to dismiss. *Schafly* v.

Volpe, 495 F. 2d 273 (7th Cir. 1974). Rather the complaint must be liberally construed with all factual allegations deemed to be true and with doubts resolved in favor of the pleader. *Parr* v. *Great Lakes Express Co.*, 484 F. 2d 767 (7th Cir. 1973). A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley* v. *Gibson*, 355 U. S. 41, 78 S. Ct. 99 (1957).

Thus, accepting plaintiff's allegations as true and construing all doubts in favor of plaintiff, this Court deems that plaintiff has alleged a cause of action in Count II on a Davis-Bacon contract which states a claim upon which relief may be granted and over which this Court has jurisdiction, based on the Seventh Circuit's finding in *McDaniel* that in such a cause of action jurisdiction may be properly predicated on 28 U. S. C. § 1337. Having asserted jurisdiction over this cause of action, the Court also has pendent jurisdiction to decide the state claims arising out of the same facts, which have been set forth in counts three through seven of the complaint. *United Mine Workers* v. *Gibbs*, 383 U. S. 715, 86 S. Ct. 1130 (1966). This Court does not thereby seek to review the determinations of the Secretary of Labor of the contracting agency; rather the Court gives plaintiff leave to show that the Secretary of Labor through ERDA has made Davis-Bacon Act determinations with respect to the alleged contract, and that plaintiff and the class have performed such work at defendant's direction, pursuant to the contract.

Defendant's fourth reason for dismissal of plaintiff's complaint is based on the effect of the Portal-to-Portal Pay Act time limitations, 29 U. S. C. §§ 255, 256, which bar any action for unpaid minimum wages under the Davis-Bacon Act which is not commenced within two years after the accrual of the cause of action. Defendant asserts that under the provisions of 29 U. S. C. § 256, governing when an action is commenced for purposes of tolling the statute of limitations set forth in 29 U. S. C. § 255, the cause of action herein is determined to have been com-

menced as to the named plaintiff on April 9, 1975, when his complaint and his written consent to become a party plaintiff were filed. Therefore, as to the named plaintiff, Stanley Coutu, the statute of limitations under § 255 would bar any cause of action for minimum wages which accrued prior to April 9, 1973.

Some Federal Courts have found that the lack of detail in notice pleading renders improper the raising of limitations questions by motion to dismiss, *see* Annot., 61 A. L. R. 2d 300, 327. However, in the Seventh Circuit a motion to dismiss raising the defense of the statute of limitations is proper where the bar of the statute can be seen from the face of the complaint. *Kincheloe* v. *Farmer*, 214 F. 2d 604 (7th Cir. 1954), *cert. denied*, 348 U. S. 920, 75 S. Ct. 306, 99 L. Ed. 721 (1955). In light of the Portal-to-Portal Act provisions with respect to actions under the Davis-Bacon Act, and in light of Rule 9A of the Federal Rules of Civil Procedure, the Court finds that defendant has properly raised the statute of limitations in his motion to dismiss.

The statutory language of § 255 clearly makes the statute of limitations applicable to plaintiff's Federal cause of action which predicates jurisdiction on 28 U. S. C. § 1337. The Court must apply state substantive law to state claims taken under pendent jurisdiction by a Federal Court. But while a statute of limitations is often considered to be a substantive matter, *J. M. Blythe* v. *Blalock*, 310 F. 2d 77 (5th Cir. 1962), the express purpose of 29 U. S. C. § 255 was to substitute a uniform Federal limitations period for the diverse periods provided under statutes of the several states. 29 U. S. C. § 251; *Hodgson* v. *Humphries*, 454 F. 2d 1279 (10th Cir. 1972). Thus the Court finds that the statute of limitations of § 255 is equally applicable to the state claims taken under pendent jurisdiction insofar as they arise by virtue of a Federal statute, and the Court's jurisdiction over them depends on their pendency to a cause of action under a statute with a two-year limitation.

There remains the question, however, whether the two-year statute of limitations is applicable on the three-year limitation

period for "willful" violations. 29 U. S. C. § 255(a). Though plaintiff has not specifically alleged "willfulness" in his complaint, with the exception of Count III, he has sufficiently pleaded his allegations to raise a factual issue as to whether defendant's actions were willful. The Court at this juncture cannot determine the issue of willfulness, but rather should defer a ruling on this issue until further evidence is presented at trial. *Bormann* v. *Long Island Press Publishing Co., Inc.*, 379 F. Supp. 951 (1974).

Defendant's fifth reason cited for dismissal of plaintiff's complaint is that it fails to state a claim upon which relief can be granted because of plaintiff's failure to allege a valid class under Rule 23 of the Federal Rules of Civil Procedure. The action is brought on behalf of the named plaintiff, individually, and as a representative of the class. Therefore, dismissal of the class would not dismiss the complaint. There has as yet been no determination as to whether the action may be maintained as a class action pursuant to Rule 23 of the Federal Rules. For these reasons, defendant's motion to dismiss for failure to allege a valid class action is unwarranted at this time.

Defendant's sixth ground for dismissal is based on plaintiff's failure to prosecute his claim pursuant to the provisions of the Miller Act, 40 U. S. C. § 270a-d, which requires defendant to procure a bond for payment of laborers and mechanics pursuant to contracts of the type in question. Defendant also asserts that plaintiff has failed to prosecute his claim under the provisions of the Davis-Bacon Act, 40 U. S. C. § 270a-2(b), which authorizes withholding of funds from the contractor for payment of unpaid laborers and mechanics employed pursuant to the contract.

The cause of action on defendant's contractual commitment under the Davis-Bacon contract is distinct from that on a Miller Act bond. *McDaniel,* 512 F. 2d 583 (7th Cir. 1975). The Miller Act cause of action arises when the contractor has furnished a bond, and when the funds withheld pursuant to § 276a-2(b), if any, are exhausted. In *McDaniel,* it was undisputed that

the contractor had not supplied a Miller Act bond, nor had the government withheld funds for payment of wage claims. In the case at bar, there has been no allegation or determination that a Miller Act bond exists or that funds were withheld from the contractor by the government. The Court need not determine whether exhaustion of these remedies is a condition precedent to a cause of action on defendant's contract commitments unless it be shown that such remedies do, in fact, exist. The withholding of funds by the government is not mandatory under 40 U. S. C. § 276a-2(b). And, as pointed out in *McDaniel,* the Miller Act bond can be waived in certain circumstances. 40 U. S. C. § 270(e). There has been no claim that such waiver here would have been unauthorized, and the complaint does not suggest that plaintiff's claim is based on defendant's failure to provide a Miller Act bond. Thus the complaint cannot be dismissed on the ground asserted by defendant in paragraph six of his motion.

Paragraphs seven and eight of defendant's motion charge that the Court cannot take jurisdiction over the claims of plaintiff's complaint for the reason that plaintiff fails to allege the requisite $10,000 damages for Federal jurisdiction and that the Court has no jurisdiction under § 1337. Defendant further asserts that, since the Court lacks jurisdiction over the Federal claims, it cannot assert pendent jurisdiction over the state claims.

These issues have already been disposed of by the Court. The Court recognizes defendant's claim of jurisdiction under 28 U. S. C. § 1337 for which no jurisdictional amount need be alleged. Having asserted Federal jurisdiction over plaintiff's Count II, the Court has pendent jurisdiction of the claims in Counts III through VII. *United Mine Workers* v. *Gibbs,* 383 U. S. 715 (1966).

Therefore, defendant's motion to dismiss is granted as to Count I. The motion is denied as to Counts II through VII. The statute of limitations bars any cause of action of the named plaintiff which accrued prior to April 9, 1972. Those claims

under Counts II, IV, V, VI and VII of the named plaintiff accruing between April 9, 1972 and April 9, 1973 are not dismissed but are subject to determinations at trial concerning the willfulness of the violations. Count III is subject only to the three-year statute of limitations.

DATED: October 8, 1975

ENTER:

/s/ Frank McGarr

MEMORANDUM ORDER

This dispute arises out of a contract for the design, construction, and operation of the National Accelerator Laboratories, between defendant Universities Research Association, Inc. and the United States government acting through the Atomic Energy Commission and its successor, the Energy Research and Development Administration (hereinafter ERDA). Plaintiff Stanley Coutu filed this class action claiming that defendant failed to duly compensate plaintiff class for work it performed during the construction of the facility. The class has been certified and is described as follows:

> All "mechanics and/or laborers" employed by defendant pursuant to Contract No. AT(49-8)-3000 between defendant and the United States of America "for construction, alteration and/or repair, including painting and decorating, of public buildings and public works of the United States" who have been paid wages less than "the wages * * * determined by the Secretary of Labor to be prevailing for the various classes of laborers and mechanics * * * in the city, town, village, or other civil subdivision of the State" in which the work was performed, all as stated and defined in the Davis-Bacon Act, 40 U. S. C. § 276a, *et seq.*

Defendant is a not-for-profit consortium of universities formed for the purpose of facilitating scientific research and charged with the responsibility for design, procurement, and fabrication of the accelerator. Jurisdiction for Counts I and II of the complaint is invoked pursuant to 28 U. S. C. §§ 1331, 1337, and this court's pendent jurisdiction is invoked to entertain the remaining counts. This cause is before the court on defendant's motion for summary judgment.

Count I and II of plaintiff's complaint are the core federal claims contained in this suit. In Count I, plaintiff class purported to state a claim on the theory that defendant failed to

compensate plaintiff class in accordance with the prevailing wage determinations made by the Secretary of Labor pursuant to the authorization of the Davis-Bacon Act, 40 U. S. C. § 279a, *et seq.*, whether or not the wage determinations were incorporated in the contract. This count was dismissed by the memorandum opinion and order filed by the Honorable Frank McGarr.

In Count II, plaintiff class alleges that the contract falls within the purview of the Davis-Bacon Act, and that the contract by its terms provides for "payment to members of plaintiff class at the legal wage rate applicable to work actually performed." Judge McGarr denied defendant's previous motion to dismiss this count on the ground that plaintiff stated a claim on which relief could be granted and over which the court had jurisdiction in accordance with *McDaniel* v. *University of Chicago,* 512 F. 2d 583 (7th Cir.), *vacated and remanded on other grounds,* 423 U. S. 810 (1975). Judge McGarr held that the contract did not preclude performance of Davis-Bacon work by defendant's employees pursuant to proper Davis-Bacon determinations by the contracting agency, ERDA, and the necessary modifications of the contract. [See Memorandum Opinion an Order at p. 8] Accordingly, plaintiff class was given "leave to show that the Secretary of Labor through ERDA has made Davis-Bacon Act determination with respect to the alleged contract, and that plaintiff and the class have performed such work at defendant's direction, pursuant to the contract." [*Id.* at p. 10]

Defendant has filed a motion for summary judgment supported by the affidavit of John R. Frazier, Chief Legal Counsel for the Fermi National Accelerator Laboratory, claiming that there is no issue of material fact and defendant is entitled to judgment as a matter of law. Defendant asserts that the only contract between defendant and the United States government is Contract No. EY-76-C-02-3000, as amended, formerly designated AT(49-8)-3000, and that "[n]o Davis-Bacon Act, 40 U. S. C. § 276a, *et seq.*, stipulations requiring the payment of

prevailing wages have ever been made a part of or incorporated in said Contract . . ." [Affidavit of John R. Frazier, ¶ 3]

Plaintiff class has filed a memorandum in opposition to defendant's motion. Plaintiff class as much concedes that the contract fails to include Davis-Bacon specifications [Plaintiff's memorandum at 1-3], but it argues that this amounts to a violation of the act which should not serve to shield defendant from plaintiffs' implied right of action found in *McDaniel* v. *University of Chicago,* 512 F. 2d 588 (7th Cir.), *vacated and remanded,* 423 U. S. 810 (1975), *reaff'd,* 548 F. 2d 689 (7th Cir. 1977). Plaintiff class argues that the following contract language contemplated the likelihood that Davis-Bacon Act work would be performed.

> ARTICLE XXXIII—LABOR PROVISIONS
>
> 1. This contract does not contemplate the performance of work by the Association, with its own employees, which the Commission determines is subject to the Davis-Bacon Act. Such work, if any, performed under this contract shall be procured by subcontracts which shall be subject to the written approval of the Commission and contain the provisions relative to labor and wages required by law to be included in contracts for the construction, alteration, and/or repair, including painting and decorating, of a public building or public work.

Based on its interpretation of the contract clause, plaintiff class argues that there is a material issue of fact with regard to who performed the contemplated Davis-Bacon work for defendant over the years. Plaintiff class has offered no affidavit and has failed to point to any material adduced during discovery which would controvert the affidavit of John Frazier.

On the present state of the record it is clear that no Davis-Bacon Act determinations have been made a part of this con-

tract, requiring defendant to pay plaintiff class at wage rates contemplated by the Davis-Bacon Act. The only issue is whether plaintiff class can proceed in this action under the Davis-Bacon Act absent any showing that the government and defendant have made a determination that the contract is subject to the Act's provisions. An examination of the contract, the Act, and the relevant regulations reveals that defendant's motion for summary judgment must be granted. There is no issue of material fact and defendant is entitled to judgment on Count II as a matter of law. *See Rose* v. *Bridgeport Brass Co.*, 487 F. 2d 804, 808 (7th Cir. 1973).

The Davis-Bacon Act is essentially a minimum wage law which requires that "specifications for every contract in excess of $2,000, to which the United States . . . is a party, for construction, alteration, and/or repair . . . of public works of the United States . . . and which requires or involves the employment of mechanics and/or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics. . . ." 40 U. S. C. § 276a. The Act is designed to protect employees of persons contracting with the government from substandard earnings. *United States* v. *Binghamton Construction Co.*, 347 U. S. 171 (1954). The determination of whether a contract is subject to the Act is made by the agency which is contracting on behalf of the United States government and the decision must be made in accordance with applicable regulations. 41 C. F. R. § 1-18.701-1, 1-18. 701-2, 9-18.700(b). The contracting agency in this case has formal guidelines and a Davis-Bacon Committee for determining what work is subject to the Act. [Kennedy Dep. 42, 46-48, 75]. Any dispute regarding the application of the Act is referable to the Secretary of Labor for an authoritative ruling. 29 C. F. R. 5.12. The efficacy of the Act hinges on minimum wage determinations by the Secretary of Labor and the incorporation of minimum wage specifications in the contract. *See Walsh* v. *Schlecht*, 97 S. Ct. 679, 686 (1977); *United States* v. *Binghamton Con-*

struction Co., 347 U. S. 171, 172 (1954); *McDaniel* v. *University of Chicago, supra; North Georgia Bldg & C. T. C.* v. *U. S. Dept. of Transportation*, 399 F. Supp. 58, 60-61 (N. D. Ga. 1975); 41 C. F. R. § 1-18.703-1 (1974).

After examination of the statutory and regulatory framework, it becomes clear that it would be improper for this court to declare in the first instance that this contract is now subject to the Davis-Bacon Act and to make appropriate wage determinations for the parties. *See Framlau Corporation* v. *Dembling*, 360 F. Supp. 806, 809 (E. D. Pa. 1973) and cases cited therein. This court concludes that there is no issue of material fact that this contract fails to contain the requisite Davis-Bacon Act specifications essential for maintenance of the claim stated in Count II. Accordingly, this court enters judgment for defendant on Count II of the complaint and that count is dismissed.

The court has examined the pendent counts raised in the complaint and due to the legally insubstantial nature of the federal claims raised in Counts I and II, the court, in the exercise of its discretion declines to assert jurisdiction over the claims raised therein. *See United Mine Workers of America* v. *Gibbs*, 383 U. S. 715 (1966); *Ohio Inns, Inc.* v. *Nye*, 542 F. 2d 673 (6th Cir. 1976), *cert. denied*, 45 U. S. L. W. 3651 (March 28, 1977); *McIlhenny* v. *American Title Ins. Co.*, 418 F. Supp. 364, 372 (E. D. Pa. 1976). Accordingly, this suit is dismissed in its entirety.

So ordered

/s/ George N. Leighton
George N. Leighton, United States District Judge

Dated: November 29, 1977

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 78-1165

STANLEY E. COUTU, et al.,
Plaintiffs-Appellants,

vs.

UNIVERSITIES RESEARCH ASSOCIATION, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 75 C 1129—George N. Leighton, *Judge.*

HEARD DECEMBER 6, 1978—DECIDED APRIL 4, 1979

Before CASTLE, *Senior Circuit Judge,* CUMMINGS and PELL, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* This action was brought by plaintiff, an electronics technician,[1] and his class seeking $5,000,000 in damages and other relief on the ground that defendant did not pay them the prevailing wages required by the Davis-Bacon Act (40 U. S. C. § 276a *et seq.*) for their construction work. Defendant is a not-for-profit consortium of universities formed to facilitate scientific research and to design, construct and operate the Fermi National Accelerator Laboratory in Batavia,

1. Plaintiff was employed by defendant at the Fermi National Accelerator Laboratory from 1972 until he resigned three years later.

Illinois. This facility is a 6800-acre Kane County site containing laboratories, research offices, related facilities, and the world's largest proton accelerator system. It is used to carry out research in the field of high-energy physics by numerous scientists from institutions located throughout the world. (App. 50 n. 3.) The Davis-Bacon Act requires government construction contracts to contain a provision stating that the minimum wages to be paid various classes of laborers and mechanics shall be based upon the wages to be determined by the Secretary of Labor to be prevailing where the work is to be performed. 40 U. S. C. § 276a(a). We held in *McDaniel* v. *University of Chicago,* 512 F. 2d 583 (7th Cir. 1975), reaffirmed on remand, 548 F. 2d 689 (7th Cir. 1977), certiorari denied, 434 U. S. 1033, that employees have an implied private right of action to sue for wages due under the Act. Our decision in the present case flows directly from the *McDaniel* opinions. The complications arise only from the procedural posture of the case and from defendant's renewed attempts to establish an exhaustion requirement.

Plaintiff and his class alleged in their "First Cause of Action" (hereinafter "Count I") that defendant violated the Davis-Bacon Act by not paying members of plaintiff's class the minimum wages "required to be paid pursuant to the said contract and the prevailing wage determinations of the Secretary of Labor and the Davis-Bacon Act" (App. 2). Count I was dismissed in an unreported October 8, 1975, memorandum opinion and order of Judge McGarr. However, that order did not dismiss the remaining six Counties of the complaint.

On August 10, 1976, Judge Leighton, to whom the class action had been transferred, certified the plaintiff class.[2] Dis-

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2. The class was described as follows:

"All 'mechanics and/or laborers' employed by defendant pursuant to Contract No. AT (49-8)-3000 between defendant and the United States of America 'for construction, alteration and/or repair, including painting and decorating, of public buildings and public works of the United States' who have been

(Footnote continued on next page.)

covery was apparently stayed in February 1977.[3] In March 1977, defendant filed a motion for summary judgment. In November 1977, Judge Leighton handed down a memorandum order granting that motion. The court noted that in Count II the plaintiff class alleged that the contract fell within the purview of the Davis-Bacon Act and that the contract by its terms provides for "payment to members of plaintiff class at the legal wage rate applicable to work actually performed." In this memorandum order, the district court noted that no Davis-Bacon Act stipulations requiring the payment of prevailing wages were ever made a part of the contract between defendant and the United States.[4] The court noted that the plaintiffs class was relying on Article XXXIII of the contract providing that the contract did not contemplate the performance of work by defendant with its own employees "which the Commission [now the Energy Research and Development Administration (ERDA)[5]] determines is subject to the Davis-Bacon Act" and that such work was to be procured by subcontracts containing "the [Davis-Bacon] provisions relative to labor and wages required by law." The court then held that the contract failed to contain the "requisite Davis-Bacon Act specifications for maintenance of

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(Footnote continued from preceding page.)

paid wages less than 'the wages * * * determined by the Secretary of Labor to be prevailing for the various classes of laborers and mechanics * * * in the city, town, village, or other civil subdivision of the State' in which the work was performed, all as stated and defined in the Davis-Bacon Act, 40 U. S. C. § 276a, *et seq.*"

3. Plaintiff apparently relies on Judge Leighton's minute order of February 18, 1977, stating "P/T completed" to show discovery was thereby stayed. Defendant's brief nowhere disputes the stay. An earlier discovery stay was ordered by Judge McGarr on December 22, 1975.

4. In this respect, the court relied on an affidavit of John R. Frazier, chief legal counsel for the Fermi National Accelerator Laboratory. As will be seen, this affidavit does not resolve the controversy.

5. ERDA is the successor to the Atomic Energy Commission.

the claims stated in Count II" and accordingly dismissed that Count. Counts III through VII of the complaint were based on state claims, and the district court declined to assert pendent jurisdiction over them "due to the legally insubstantial nature of the federal claims." Therefore, the complaint was dismissed in its entirety.

No notice of appeal was filed with respect to Judge McGarr's dismissal of Count I of the complaint, so that the principal question before us is whether Count II, asserting that defendant breached contractual obligations to the members of plaintiff class, was properly dismissed. At the outset, the parties disagree on what was decided by Judge McGarr and therefore what remained to be decided by Judge Leighton. The defendant insists that only two narrow fact questions were left open by Judge McGarr: (1) whether the contract actually contained Davis-Bacon Act stipulations and, if so, (2) whether Davis-Bacon Act work was performed by members of the plaintiff class. If this were all that was left for Judge Leighton to decide, the affidavit that there were no Davis-Bacon Act stipulations (n. 4 *supra*) might require affirmance of the summary judgment. However, we do not believe that Judge McGarr reduced the suit to a simple case of whether express wage stipulations in the contract had been breached. On the contrary, in dismissing Count I Judge McGarr held only that if the contract was not a Davis-Bacon Act contract plaintiff could not recover.[6] Clearly if a contract contains the required wage stipulations, this would

6. There is some support for the proposition that if work covered by the Davis-Bacon Act happens to be performed under a contract which did not intend that such work be performed by anyone, it is not covered by the Act. 40 Comp. Gen. 565 (1961). This interpretation, however, raises the additional question of who is to decide whether a contract is subject to the Act. Judge McGarr appeared to accept defendant's contention that authority to make this determination was accorded exclusively to the executive departments so that their decisions in this regard are not subject to judicial review (App. 23). We note in addition that even if such administrative action is reviewable, there may be an exhaustion requirement. We do not decide any of these questions, since they are not before us.

show that it was a Davis-Bacon Act contract. Judge McGarr apparently recognized, however, and we agree, that clauses in the contract other than the wage stipulations may reveal that the contract was one for Davis-Bacon Act work (App. 25).

Thus two theories of recovery remained open to the plaintiff class after Judge McGarr's dismissal: (1) there may have been Davis-Bacon Act stipulations in the contract or (2) there may have been other evidence that the contract was one for Davis-Bacon Act work, in which case the required stipulations arguably become a part of the contract by operation of law. Judge Leighton's grant of summary judgment was based on the affidavit (n. 4 *supra*) tending to disprove only the first of these two theories. We hold that summary judgment was improperly entered against plaintiff and his class because the required wage stipulations were incorporated by operation of law.

The Davis-Bacon Act Applies to Construction, Alteration or Repair Work Performed by Defendant

The key provision in the Contract between defendant and the United States Government acting through ERDA is Article XXXIII which provides in pertinent part as follows:

> "This contract does not contemplate the performance of work by the Association, with its own employees, which the Commission determines is subject to the Davis-Bacon Act. Such work, if any, performed under this contract shall be procured by subcontracts which shall be subject to the written approval of the Commission and contain the provisions relative to labor and wages required by law to be included in contracts for the construction, alteration and/or repair, including painting and decorating, of a public building or public work."

In this lawsuit, plaintiff contends that defendant's own employees performed and are performing construction, alteration and repair work at the Fermi Laboratory, so that the Davis-Bacon Act wage provisions are applicable to the work done by plaintiff and

his class. We agree that if the defendant actually performed such work with its own employees at the Fermi Laboratory, they became entitled to the prevailing wages in Kane County where the work was to be performed. This conclusion follows from our holding in *McDaniel* v. *University of Chicago, supra.*

McDaniel involved a government contract clause which is virtually identical to Article XXXIII of this contract. The contract at issue in *McDaniel* was between the Atomic Energy Commission and the University of Chicago for operation of the Argonne National Laboratory. That contract barred the University of Chicago from construction work of a kind subject to the Davis-Bacon Act. As with Article XXXIII of the present contract, the University of Chicago was to have all Davis-Bacon Act work performed by subcontractors.[7] We held that the construction or alteration work performed by the University of Chicago was subject to the provisions of the Davis-Bacon Act even though the contract lacked a stipulation requiring the payment of Davis-Bacon Act wage rates, stating:

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7. The applicable clause of the *McDaniel* contract between the University of Chicago and the Atomic Energy Commission provided:

> "26.5 *Davis-Bacon and Other Labor Provisions for Construction Subcontracts.*
>
> "The University and the Commission have agreed upon a procedure under which the Commission will determine when work to be undertaken at the Laboratory Facilities is covered by the Davis-Bacon Act. When it is determined that the Davis-Bacon Act does cover a particular work project, the University shall procure by subcontract the covered work. Any subcontract entered into under this section shall contain the provisions relative to labor and wages required by law to be included in contracts for the construction, alteration and/or repair, including painting and decorating, of a public building or public work. When requested by the Commission, any such subcontract shall be submitted for Commission approval.
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> * * * * *
>
> "Supplement No. 16, Appendix D."
>
> (quoted at p. 1a of the Solicitor General's *amicus curiae* brief on petition for a writ of certiorari from the Supreme Court in *University of Chicago and Argonne* v. *McDaniel,* 434 U. S. 1033.)

> "There is no question but that this government contract was subject to the provisions of the Davis-Bacon Act. Accordingly 40 U.S.C. § 276a required the specifications to 'contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work' in the place of performance, and required any contract based on the specifications to contain certain stipulations concerning payment of mechanics and laborers by the contractor or subcontractor." (512 F. 2d at 584.)

Similarly here, the provisions of the Davis-Bacon Act must be read into Article XXXIII when, pursuant to a contract requiring Davis-Bacon Act work, the defendant performs "construction, alteration, and/or repair * * * of public buildings or public works of the United States * * * which requires or involves the employment of mechanics and/or laborers." Section 1 of the Davis-Bacon Act applies to such work in government contracts in excess of $2,000 and mandates that an employer must pay "wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the * * * subdivision of the State in which the work is to be performed * * *." 40 U. S. C. § 276a.

Indeed, in a January 23, 1973, letter from the Atomic Energy Commission's Chicago Operations Office Manager to the president of the defendant, both those parties foresaw that conditions might arise which might make it necessary for the defendant to perform Davis-Bacon Act work and in such instance to modify the contract to incorporate the Davis-Bacon Act provisions relative to labor and wages. Since under *McDaniel I* the contract was already so modified by operation of law, amendments to the contract were not needed to accomplish that result.

McDaniel was not an isolated instance of reading applicable statutory requirements into government contracts. We were

merely following precedents established as early as 1827 and applied consistently thereafter.[8] Because the provision to pay the prevailing wage rate was incorporated by operation of law, the affidavit relied upon by the district court to the effect that no Davis-Bacon Act "stipulations requiring the payment of prevailing wages have ever been made a part of or incorporated in" the contract (see n. 4 *supra*) is insufficient to support the grant of summary judgment. Therefore it was unnecessary for plaintiff to tender a counter-affidavit.

It is uncontested that the Secretary of Labor has published general wage determinations in decisions published in the Federal Register that are applicable to labor on government projects in Kane County, Illinois, where the Fermi Laboratory is located and where the defendant's alleged construction activity has been performed.[9] Therefore the district court was mistaken

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8. See, *e.g., Ogden* v. *Saunders,* 25 U. S. (12 Wheat.) 212 (1827); *Woods* v. *Lovett,* 313 U. S. 362, 370; *G. L. Christian & Associates* v. *United States,* 312 F. 2d 418, 320 F. 2d 345 (Ct. Cl. 1963), certiorari denied, 375 U. S. 954; *United States* v. *New Orleans Public Service Inc.,* 553 F. 2d 459, 469 (5th Cir. 1977); *Campagnie Générale Transatlantique* v. *American Tobacco Co.,* 31 F. 2d 663, 666 (2d Cir. 1929); *City of Tullahoma* v. *Coffee County,* 204 F. Supp. 794, 800 (E. D. Tenn. 1962); 3 Corbin on Contracts, § 551; 4 Williston on Contracts, § 615 at p. 621; Dees and Ginsberg, *Contract Interpretations and Defective Specifications* (Government Contracts Monograph No. 4, 1975 ed., George Washington University) 1-4.

United States v. *Joseph A. Holpuch Co.,* 328 U. S. 234, on which defendant relies, is not to the contrary. It did not concern the question whether applicable statutory terms must be read into government contracts. *International Association of Machinists* v. *Hodgson,* 515 F. 2d 373 (D. C. Cir. 1975), cited by defendant at oral argument, is also consistent with our holding. That case involved the Secretary of Labor's decision to exercise his discretion not to issue a wage determination under the Service Contract Act. The Davis-Bacon Act, however, confers no such discretion on him.

9. See 43 F. R. 11379-11383 containing the introductory notice to a recent compilation of the Secretary's wage determinations and decisions specifically applicable to government project work in Kane County. 42 F. R. 30108-30111, 35522, 39847-39848 contain examples of such decisions.

in concluding that to sustain plaintiff's position would require it to make wage determinations for the parties.

Exhaustion of Administrative Remedies Is Not Required

If defendant or our own research had uncovered administrative regulations affording plaintiff and his class relief in this situation, we might require recourse to that remedy before permitting this lawsuit to proceed. The Davis-Bacon Act itself does not contain a provision requiring exhaustion of administrative remedies in this kind of case. Moreover, we rejected such an argument in the second *McDaniel* case where the University of Chicago had argued that administrative procedures afforded adequate relief to the individual employees of a government contractor.[10] In the *McDaniel* cases, there was no showing that the plaintiff and his class had attempted to secure administrative relief, and in according them a judicial remedy we necessarily decided that there was no requirement that they first seek redress from the contractor or the Department of Labor. Moreover, the administrative procedures seem to be aimed at contractor compliance with the Davis-Bacon Act. Defendant has not shown that the Secretary of Labor has any authority to order a contractor to pay more for Davis-Bacon work already completed.[11] As the Government itself recognized in *McDaniel II*,

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10. See p. 12 of supplemental brief for defendants-appellees in *McDaniel* v. *University of Chicago*, 548 F. 2d 689 (7th Cir. 1976), certiorari denied, 434 U. S. 1033.

11. Enforcement through contract termination and debarment from future contracts is provided for. 40 U. S. C. § 276a-1; 29 C. F. R. § 5.7(d); 29 C. F. R. § 5.6(b)(1). Additionally, the regulations provide for suspension of payments under the contract if the agency (here ERDA) determines the contractor has failed to "comply with labor standards stipulations * * *" (29 C. F. R. § 5.9). This remedy seems inadequate to assure the employees of a full recovery in the present case for three reasons: (1) it is based on the assumption that there are stipulations in the contract, (2) it provides for withholding payment only until the violations are discontinued or (apparently in the agency's discretion) enough has been withheld to compensate the employees, and (3) withholding funds is hardly

(Footnote continued on next page.)

> "Neither the statute nor the regulations promulgated thereunder provide any administrative remedy in favor of an employee who has been injured by the failure to include the prevailing-wage provisions in a contract." (Solicitor General's *amicus curiae* brief opposing the petition for a writ of certiorari in *University of Chicago and Argonne* v. *McDaniel,* 434 U. S. 1033, at 25, n. 20.)

Instead, the regulations are either inadequate as to this class or are merely detailed guidelines for determining what constitutes Davis-Bacon work.[12] While such regulations presumably facilitate contractor compliance, they do not assure a remedy to employees.[13]

The cases cited by defendant for the proposition that the administrative remedies are adequate involved contracts which did contain Davis-Bacon Act stipulations. The disputes in those cases focused on the proper classification of work[14] or the

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(Footnote continued from preceding page.)
feasible in this case since, as counsel for defendant advised us at oral argument, the defendant is merely a conduit for federal funds. It is thus not clear that such a contractor can or should be required to make restitution out of its own unrelated funds.

Finally, the regulations provide that "[t]he Agency Head may, in appropriate cases * * * request that restitution be made * * *." (29 C. F. R. § 5.10.) Apart from the fact that the precatory language of this regulation gives employees no sure means of redress, this would not seem to be an "appropriate case" for such restitution in view of the defendant's self-styled conduit nature.

12. See n. 11 *supra* and 41 C. F. R. §§ 9-18.701, 9-18.704, 9-18.740.

13. The Disputes clause contained in Article XIX of the contract with respect to the resolution of controversies between the contracting parties is inapplicable because it relates only to questions of fact whereas the question before us is essentially one of law, *vis.,* whether the provisions of the Davis-Bacon Act apply to construction, alteration or repair work performed by defendant's employees, and because this is not a controversy between the contracting parties.

14. *North Georgia Building & Construction Trades Council* v. *Department of Transportation,* 399 F. Supp. 58 (N. D. Ga. 1975); *Framlau Corporation* v. *Dembling,* 360 F. Supp. 806 (E. D. Pa. 1973); *In re Stanford Linear Accelerator Center,* 16 Wage-Hour Cases 851 (Wage Appeals Board, Department of Labor 1965).

determination of wage rates.[15] These and other cases involving the finality of the Secretary of Labor's decisions regarding wage rates and job classifications are not germane to the central question in this case, which is whether the required wage rate stipulations are incorporated into the contract as a matter of law. That is not a question on which deference to agency expertise is appropriate.

In addition, defendant's reliance on Section 4 of the Act (40 U. S. C. § 276a-3)[16] is misplaced since defendant has been unable to identify anything in the Atomic Energy Act or any other federal statute that authorizes ERDA to establish specific wage rates. While 41 C. F. R. § 9-15.5006(i) recommends that wages as well as other costs be set out in ERDA contracts, this does not authorize ERDA to establish non Davis-Bacon Act rates in contracts to which that Act applies. Even if this were the intent of the regulation, since it is not authorized by law it could not qualify as an exception under Section 4 of the Act.[17]

Plaintiff must now be permitted to resume discovery (or employ other suitable means) to determine whether defendant

---

15. *International Union of Operating Engineers* v. *Arthurs,* 355 F. Supp. 7 (W. D. Okla. 1973), affirmed, 480 F. 2d 603 (10th Cir. 1973).

16. Section 4 of the Act provides:

> *"Effect on other Federal laws*
>
> "Sections 276a to 276a-5 of this title shall not be construed to supersede or impair any authority otherwise granted by Federal law to provide for the establishment of specific wage rates."

17. There is other evidence that ERDA is not authorized to set wage rates that do not comply with the Davis-Bacon Act. Executive Order 10789, pursuant to 50 U. S. C. § 1431, authorizes the Secretary of the Atomic Energy Commission (predecessor to ERDA) to enter into contracts containing certain limitations. Paragraph 13 of that Order specifically states that nothing in the Order shall be construed to allow the Secretary to set aside the requirements of the Davis-Bacon Act. If he already had that power by federal law, this provision in the Executive Order would be both superfluous and unavailing.

used plaintiff and his class to perform construction, alteration or repair work at the Fermi Laboratory. If so, under the Davis-Bacon Act they will be entitled to recover wages that the Secretary of Labor has determined to be prevailing for the corresponding classes of laborers and mechanics employed on similar projects in Kane County, Illinois. Since the district court had jurisdiction over Count II, it also had pendent jurisdiction to decide state claims presented in Counts III-VII.

The judgment dismissing the complaint is reversed and the cause is remanded for further consideration consistent with this opinion.

A True Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1945

UNIVERSITIES RESEARCH ASSOCIATION, INC.,

Petitioner,

vs.

STANLEY E. COUTU,

Respondent.

Facts and Opinion 595 F. 2d 396

Ordered that: The Petition for Writ of Certiorari is granted.

DAVIS-BACON ACT

§ 276a. Rate of Wages for Laborers and Mechanics

(a) The advertised specifications for every contract in excess of $2,000, to which the United States or the District of Columbia is a party, for construction, alteration, and/or repair, including painting and decorating, of public buildings or public works of the United States or the District of Columbia within the geographical limits of the States of the Union, or the District of Columbia, and which requires or involves the employment of mechanics and/or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village, or other civil subdivision of the State, in which the work is to be performed, or in the District of Columbia if the work is to be performed there; and every contract based upon these specifications shall contain a stipulation that the contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work, unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at time of payment, computed at wage rates not less than those stated in the advertised specifications, regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and such laborers and mechanics, and that the scale of wages to be paid shall be posted by the contractor in a prominent and easily accessible place at the site of the work; and the further stipulation that there may be withheld from the contractor so much of accrued payments as may be considered necessary by the contracting officer to pay to

laborers and mechanics employed by the contractor or any subcontractors on the work the difference between the rates of wages required by the contract to be paid laborers and mechanics on the work and the rates of wages received by such laborers and mechanics and not refunded to the contractor, subcontractors, or their agents.

(b) As used in sections 276a to 276a—5 of this title the term "wages", "scale of wages", "wage rates", "minimum wages", and "prevailing wages" shall include—

(1) the basic hourly rate of pay; and

(2) the amount of—

(A) the rate of contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a fund, plan, or program; and

(B) the rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing benefits to laborers and mechanics pursuant to an enforcible commitment to carry out a financially responsible plan or program which was communicated in writing to the laborers and mechanics affected,

for medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, for unemployment benefits, life insurance, disability and sickness insurance, or accident insurance, for vacation and holiday pay, for defraying costs of apprenticeship or other similar programs, or for other bona fide fringe benefits, but only where the contractor or subcontractor is not required by other Federal, State, or local law to provide any such benefits:

Provided, That the obligation of a contractor or subcontractor to make payment in accordance with the prevailing wage determinations of the Secretary of Labor, insofar as sections 276a

to 276a—5 of this title and other Acts incorporating sections 276a to 276a—5 of this title by reference are concerned may be discharged by the making of payments in cash, by the making of contributions of a type referred to in paragraph (2)(A), or by the assumption of an enforcible commitment to bear the costs of a plan or program of a type referred to in paragraph (2)(B), or any combination thereof, where the aggregate of any such payments, contributions, and costs is not less than the rate of pay described in paragraph (1) plus the amount referred to in paragraph (2).

In determining the overtime pay to which the laborer or mechanic is entitled under any Federal law, his regular or basic hourly rate of pay (or other alternative rate upon which premium rate of overtime compensation is computed) shall be deemed to be the rate computed under paragraph (1), except that where the amount of payments, contributions, or costs incurred with respect to him exceeds the prevailing wage applicable to him under section 276a to 276a—5 of this title, such regular or basic hourly rate of pay (or such other alternative rate) shall be arrived at by deducting from the amount of payments, contributions, or costs actually incurred with respect to him, the amount of contributions or costs of the types described in paragraph (2) actually incurred with respect to him, or the amount determined under paragraph (2) but not actually paid, whichever amount is the greater.

§ 276a—1. Termination of Work on Failure to Pay Agreed Wages; Completion of Work by Government

Every contract within the scope of sections 276a to 276a—5 of this title shall contain the further provision that in the event it is found by the contracting officer that any laborer or mechanic employed by the contractor or any subcontractor directly on the site of the work covered by the contract has been or is being paid a rate of wages less than the rate of wages required by the contract to be paid as aforesaid, the Government may, by written

notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been a failure to pay said required wages and to prosecute the work to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government of any excess costs occasioned the Government thereby.

§ 276a—2. PAYMENT OF WAGES BY COMPTROLLER GENERAL FROM WITHHELD PAYMENTS; LISTING CONTRACTORS VIOLATING CONTRACTS

(a) The Comptroller General of the United States is authorized and directed to pay directly to laborers and mechanics from any accrued payments withheld under the terms of the contract any wages found to be due laborers and mechanics pursuant to sections 276a to 276a—5 of this title; and the Comptroller General of the United States is further authorized and is directed to distribute a list to all departments of the Government giving the names of persons or firms whom he has found to have disregarded their obligations to employees and subcontractors. No contract shall be awarded to the persons or firms appearing on this list or to any firm, corporation, partnership, or association in which such persons or firms have an interest until three years have elapsed from the date of publication of the list containing the names of such persons or firms.

(b) If the accrued payments withheld under the terms of the contract, as aforesaid, are insufficient to reimburse all the laborers and mechanics, with respect to whom there has been a failure to pay the wages required pursuant to sections 276a to 276a—5 of this title, such laborers and mechanics shall have the right of action and/or of intervention against the contractor and his sureties conferred by law upon persons furnishing labor or materials, and in such proceedings it shall be no defense that such laborers and mechanics accepted or agreed to accept less than the required rate of wages of voluntarily made refunds.

§ 276a—3. EFFECT ON OTHER FEDERAL LAWS

Sections 276a to 276a—5 of this title shall not be construed to supersede or impair any authority otherwise granted by Federal law to provide for the establishment of specific wage rates.

§ 276a—4. EFFECTIVE DATE OF SECTIONS 276a to 276a—5

days after August 30, 1935, but shall not affect any contract then existing or any contract that may thereafter be entered into pursuant to invitations for bids that are outstanding on August 30, 1935.

§ 276a—5. SUSPENSION OF SECTIONS 276a TO 276a—5 DURING EMERGENCY

In the event of a national emergency the President is authorized to suspend the provisions of sections 276a to 276a—5 of this title.

§ 276a—6. APPROPRIATION

§ 276a—7. APPLICATION OF SECTIONS 276a TO 276a—5 TO CONTRACTS ENTERED INTO WITHOUT REGARD TO SECTION 5 OF TITLE 41

The fact that any contract authorized by any Act is entered into without regard to section 5 of Title 41, or upon a cost-plus-a-fixed-fee basis or otherwise without advertising for proposals, shall not be construed to render inapplicable the provisions of sections 276a to 276a—5 of this title, if such Act would otherwise be applicable to such contract.

§276c. REGULATIONS GOVERNING CONTRACTORS AND SUBCONTRACTORS

The Secretary of Labor shall make reasonable regulations for contractors and subcontractors engaged in the construction,

prosecution, completion or repair of public buildings, public works or buildings or works financed in whole or in part by loans or grants from the United States, including a provision that each contractor and subcontractor shall furnish weekly a statement with respect to the wages paid each employee during the preceding week. Section 1001 of Title 18 shall apply to such statements.

PROVISIONS OF GOVERNMENT CONTRACT AT (49-8)-3000

This Supplemental Agreement (hereinafter referred to as "this contract"), is entered into the 6th day of April 1972, effective as of July 1, 1971, between the United States of America (hereinafter referred to as the "Government"), acting through the U. S. Atomic Energy Commission (hereinafter referred to as the "Commission"), and Universities Research Association, Inc. (hereinafter referred to as the "Association" or "Contractor"), a corporation organized and existing pursuant to the District of Columbia Non-Profit Corporation Act.

* * * * *

This contract is authorized by and has been negotiated and entered into under Section 302(c)(15) of the Federal Property and Administrative Services Act of 1949, as amended, and the Atomic Energy Act of 1954, as amended.

* * * * *

ARTICLE VI—ALLOWABLE COSTS

1. Payment for the allowable cost as hereinafter defined, plus the allowance provided for in paragraph 5 of this article, shall constitute full and complete compensation for the performance of the work under this contract.

2. The allowable costs of performing the work under this contract shall be the costs and expenses that are actually incurred by the Association in performance of the contract work in accordance with its terms, that are necessary or incident thereto, and are determined to be allowable pursuant to this paragraph 2. The determination of the allowability of cost hereunder shall be based on:

* * * * *

g. Personnel costs and related expenses incurred in accordance with Appendix B, or amendments thereto, such as:

(i) Salaries and wages; bonuses and incentive compensation; overtime, shift differential, holiday and other

premium pay for time worked; nonwork time including vacations, holidays, sick, funeral, military, jury, witness, and voting leave; salaries and wages to employees in their capacity as union stewards and committeemen for time spent in handling grievances, or serving on labor management (contractor) committees: Provided, however, that the Contracting Officer's approval is required in each instance of direct compensation to an individual employee at an annual rate in excess of $20,000, when it is proposed that a total of 50 percent or more of such compensation be reimbursed under AEC cost-type contracts. Direct compensation, as used here, includes only the employee's base salary and bonus and incentive compensation payments.

* * * * *

Appendix B may be modified from time to time, in writing, without execution of an amendment to this contract for the purposes of effecting any changes in or additions to Appendix B as may be agreed upon by the parties.

* * * * *

ARTICLE XXXIII—LABOR PROVISIONS

1. This contract does not contemplate the performance of work by the Association, with its own employees, which the Commission determines is subject to the Davis-Bacon Act. Such work, if any, performed under this contract shall be procured by subcontracts which shall be subject to the written approval of the Commission and contain the provisions relative to labor and wages required by law to be included in contracts for the construction, alteration, and/or repair, including painting and decorating, of a public building or public work.

* * * * *

Contract No. AT (49-8)-3000

APPENDIX B

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APPENDIX B

I. Allowability of Personnel Costs and Related Expenses

Allowability of personnel costs and related expenses shall be in accordance with the provisions of this appendix, unless individual exceptions are granted by the Laboratory Director or the President of URA and are approved by the Contracting Officer.

* * * * *

III. Wages and Salaries

A. Salary and Wage Schedules

1. The wage and salary schedules in effect at the Laboratory are included in Section XIX.
2. The Laboratory will establish a pattern of wage and salary review, and not less often than once each year will provide the Commission with data sufficient for the proper review and prior approval of overall merit wage and salary adjustments proposed for all employees, excluding organized employees. In addition, the Laboratory will provide the Commission with such current wage and salary data as may from time to time be required in connection with the Laboratory's wage and salary program.
3. Except as may be approved by the Contracting Officer, salary increases to present employees will not exceed the employee's prior rate of pay by more than fifteen percent (15%), except in the case of promotion to a higher classification, where the new minimum rate for that classification may be paid.

* * * * *

Revision No. 34 Contract AT(49-8)-3000

March 1, 1975 Appendix B

FERMI NATIONAL ACCELERATOR LABORATORY

Weekly Job Titles and Grades

Titles	Grades
Clerk I	W-1
Drafting Asst	1
Fire Fighter	1
Fire Fighter Trainee	1
Fire Lieutenant	1
Food Service Helper	1
Keypunch Operator I	1
Laboratory Asst	1
Operating Asst/Accelerator	1
Scanner Trainee	1
Stenographer	1
Assembler, Bench or Floor	W-2
Clerk II	2
Keypunch Operator II	2
Scanner I	2
Secretary I	2
Telephone Operator I	2
Detail Draftsman	W-3
Food Service Attendant	3
Food Service Laborer	3
Janitorial Worker I	3
Laboratory Technician	3
Maintenance Worker I	3
Model Maker Jr.	3
Operating Tech/Accelerator	3
Scanner II	3
Shop Helper	3
Telephone Operator II	3
Carpenter II	W-4
Chief Telephone Operator	4
Clerk III	4
Computer Operator I	4
Food & Beverage Handler	4
Keypunch Operator III	4
Mail Clerk	4
Secretary II	4
Accelerator Operator I	W-5
Draftsman	5
Groundskeeper	5
Janitorial Worker II	5
Ld Shop Helper	5
Mail Carrier	5
Maint. Electrician II	5
Maint. Mechanic II— HVAC	5
Maint. Worker II	5
Programmer Trainee	5
Rigger	5
Scanner III	5
Technician I	5
Bartender	W-6
Clerk Sr.	6
Construction Inspector I	6
Cook	6
Food Service Supr.	6
Janitorial Group Ldr	6
Lead Keypunch Operator	6
Photographer	6
Secretary III	6
Maintenance Group Ldr	6

Titles	Grades
Carpenter III	W-7
Computer Operator II	7
Expediter	7
Locksmith	7
Maint. Electrician III	7
Maint. Mechanic III—HVAC	7
Model Maker	7
Nurse	7
Painter	7
Sr. Draftsman	7
Sr. Groundskeeper	7
Sr. Mail Carrier	7
Sr. Scanner	7
Technician II	7

Titles	Grades
Accelerator Operator II	W-8
Asst Programmer	8
Carpentry Grp Ldr	8
Construction Inspector II	8
Lead Groundskeeper	8
Maint. Electrician IV	8
Maint. Mechanic IV—HVAC	8
Sr. Photographer	8
Computer Operator III	W-9
Design Draftsman	9
Electrician Group Leader	9
HVAC Group Leader	9
Model Maker Sr.	9
Nurse Sr.	9
Sr. Technical Aide	9
Sr. Accelerator Operator	W-10
Sr. Design Draftsman	10

Revision No. 35
April 1, 1975

Contract AT(49-8)-3000
Appendix B

FERMI NATIONAL ACCELERATOR LABORATORY

Weekly Pay Ranges

Grade	Minimum	Midpoint	Maximum
W- 1	$118	$136	$154
2	130	149	169
3	144	165	186
4	158	182	206
5	174	200	226
6	191	220	249
7	211	242	273
8	231	266	301
9	255	293	331
10	279	321	363

Revision No. 34

November 1, 1974

SCHEDULE OF WAGES* (EFF. 11/1/74)

1. Basic Hourly Rates:**

	Effective 11/1/74		
	Start	6 Months	One Year
Occupational Group 1			
Working Foreman	7.61	7.76	7.81
Instrument Maker	6.91	7.31	7.41
Instrument Machinist	6.61	7.11	7.21
Occupational Group 2			
Working Foreman	7.61	7.76	7.81
Repair Machinist	6.61	7.11	7.21
Occupational Group 3			
Working Foreman	7.61	7.76	7.81
Lead Instrument Welder	6.91	7.31	7.41
Instrument Welder	6.61	7.11	7.21
Occupational Group 4			
Machine Repair Mechanic	5.07	5.32	5.57
Lead Machine Shop Ass't	4.82	5.07	5.32
Machine Shop Ass't	4.57	4.82	5.07
Occupational Group 5			
Production Welder	4.82	5.07	—

2. Longevity:
   a. Two years' service in bargaining unit—5¢ above basic rate
   b. Three years' service in bargaining unit—10¢ above basic rate

* This is a schedule of minimum rates; the Laboratory may pay at rates above those listed to employees whose work performance, as evaluated by the Laboratory, merits such treatment.

** Employees who are promoted to a higher classification shall be paid at the equivalent bargaining unit seniority rate in the higher classification as they previously occupied in the lower classification.

UNITED STATES ATOMIC ENERGY COMMISSION
Chicago Operations Office
9800 South Cass Avenue
Argonne, Illinois 60439

January 23, 1968

Dr. Norman F. Ramsey, President
Universities Research Association, Inc.
2100 Pennsylvania Avenue, N. W.
Washington, D. C. 20037

Dear Dr. Ramsey:

Contract No. AT(49-8)-3000 for the 200 BEV Accelerator does not contemplate the performance of Davis-Bacon Act work by the Association with its employees, and provides that any work determined by AEC to be subject to that Act will be performed under subcontracts containing the provisions relative to labor and wages required by law to be included in contracts for the construction of a public building or work. This provision with respect to the Davis-Bacon Act has been discussed between representatives of AEC and the Association, and has been included with the following understandings:

(a) If presently unforeseen conditions arise which make it necessary in the best interests of timely and efficient completion of the accelerator that work be performed by the Association with its own employees which AEC determines is subject to the Davis-Bacon Act, the contract will be modified as appropriate to incorporate the provisions relative to labor and wages required by law.

(b) Should the Laboratory Director desire a review of any determinations with respect to the applicability of the Davis-Bacon Act, written requests for such reviews may be submitted to the AEC General Manager for consideration and resolution.

Sincerely yours,
/s/ Kenneth A. Dunbar
Kenneth A. Dunbar
Manager

UNITED STATES ATOMIC ENERGY COMMISSION
Chicago Operations Office
9800 South Cass Avenue
Argonne, Illinois 60439

April 6, 1972

Dr. Norman F. Ramsey, President
Universities Research Association, Inc.
2100 Pennsylvania Avenue, N. W.
Washington, D. C. 20037

Dear Dr. Ramsey:

Modification No. 14 to Contract No. AT(49-8)-3000 for the 200 BEV Accelerator does not contemplate the performance of Davis-Bacon Act work by the Association with its employees, and provides that any work determined by AEC to be subject to that Act will be performed under subcontracts containing the provisions relative to labor and wages required by law to be included in contracts for the construction of a public building or work. This provision with respect to the Davis-Bacon Act has been discussed between representatives of AEC and the Association, and has been included with the following understandings:

(a) If presently unforeseen conditions arise which make it necessary to the best interests of timely and efficient completion of the accelerator that work be performed by the Association with its own employees which AEC determines is subject to the Davis-Bacon Act, the contract will be modified as appropriate to incorporate the provisions relative to labor and wages required by law.

(b) Should the Laboratory Director desire a review of any determinations with respect to the applicability of the Davis-Bacon Act, written requests for such reviews may be submitted to the AEC General Manager for consideration and resolution.

Sincerely yours,
/s/ Kenneth A. Dunbar
Kenneth A. Dunbar
Manager

AMENDED FIRST REQUEST TO PRODUCE.

Defendant, Universities Research Association, Inc., is hereby requested, pursuant to Rule 34 of the Federal Rules of Civil Procedure, to produce the items described hereafter for inspection and copying by plaintiff's attorneys at the offices of Arnold and Kadjan, 11 South LaSalle Street, Chicago, Illinois within thirty days after service hereof or within such shorter date as may be fixed by the court herein.

I. DEFINITIONS AND CONSTRUCTION.

A. As used herein, the words and phrases set out below shall have the meaning or meanings prescribed for them:

1. "Document or documents" shall mean every original (and every copy of any original or copy which differs in any way from any original) of every writing or recording of every kind or description, whether handwritten, typed, drawn, sketched, printed, or recorded by any physical, mechanical, electronic or electrical means whatever, including without limitation books, records, papers, pamphlets, brochures, circulars, advertisements, specifications, blueprints, maps, plats, surveys, drawings, sketches, graphs, charts, plans, tests, laboratory or engineering reports, measurements, models, correspondence, communications, telegrams, memoranda, notes, notebooks, worksheets, reports, lists, analyses, summaries, ledgers, books of original entry, journals, accounts, audits, inventories, tax returns, Federal Forms WH347, unemployment compensation forms, financial statements, profit and loss statements, cash flow statements, balance sheets, annual or other periodic reports, budgets, prospectuses, registrations, solicitations, minutes, stock ledgers, stock certificates, certificates of deposit, time account passbooks, securities, licenses, permits, calendars, appointment books, diaries, telephone bills and toll call records, expense reports, commission statements, itineraries, agendas, wage and payroll records, employment and personnel records, checkbooks, check

stubs, bank statements, cancelled checks, receipts, cash disbursement ledgers, contracts, agreements, instruments, assignments, applications, authorizations, offers, acceptances, bids, proposals, financing statements, documents of title, appraisals, purchase orders, invoices, bills or statement of account, bills of lading, written memorials of oral communications, forecasts, photographs, photographic slides or negatives, films, filmstrips, tapes, and recordings.

2. "Related" or "relating to" shall mean directly or indirectly mentioning or describing, pertaining to, being connected with, or reflecting upon a stated subject matter.

e. "Identification" or "identify" as applied to documents shall mean stating the date, author, addressee, signatory, number of pages, subject matter (which shall be stated with particularity) and giving the name and address of the custodian thereof and the location of the document.

4. "Relied upon" shall mean being or having been depended upon or referred to or being or having been arguably appropriate for such reliance.

5. "Defendant" shall mean the defendant in this lawsuit and its predecessors and successors, if any, and, when not negated by the context, shall also mean each and every officer, employee, attorney or agent of each and every such entity who presently holds such a position or has held such a position at any time during the period covered by this request.

6. "Person" shall mean each and every individual, corporation, partnership, joint venture, social or political organization or any other entity, whether real or juridical or incorporated or unincorporated, encompassed within the usual and customary meaning of "person" or otherwise encompassed within this definition.

7. "Technician" shall mean any person who is or has been employed by defendant at the Fermi National Accelerator Laboratory site at any time during the relevant period who was

assigned the title or performed the work of a Technician I, Technician II, Senior Technician, Technician (or "Tech") Specialist, Laboratory (or "Lab") Assistant, Laboratory (or "Lab") Technician (or "Tech") or Operator.

B. In construing this request:

1. The singular shall include the plural and the plural shall include the singular.

2. A masculine, feminine or neuter pronoun shall not exclude the other genders.

3. If a request for production is silent as to the time span for which production is desired, production shall be made of all documents requested from January 1, 1970 to the date of production.

4. Each request shall extend to all documents which are or have been in the possession or subject to the control of the defendant, its officers, agents, attorneys or employees at any time during the period of time covered by this request.

5. The requests to produce contained herein shall be deemed to be continuing in nature and shall include documents described herein which are discovered after any initial production of documents in compliance herewith, which later-discovered documents shall be produced in accordance with this Request to Pro duce within thirty days after their discovery.

II. CLAIMS OF PRIVILEGE.

All documents as to which any privilege is claimed shall be produced, marked, identified, held separately, and retained intact by the defendant subject to and pending a ruling by the court as to the claimed privilege.

III. PRODUCTION REQUESTS.

The following are to be produced at the time and place described above:

1. Each and every document related to the number, identity number, present or last known address, hiring, advancement,

termination, tenure and conditions of employment, union membership, compensation (including fringe benefits), nature of work performed, quality of work performed, job description and job title of the following:

a. All persons employed or sought to be employed by defendant as Technicians or any functional equivalent thereof; and

b. All persons employed by defendant who performed any labor in connection with construction, alteration and/or repair, including painting and decorating, of any public buildings or public works of the United States.

2. Each and every document related to communications between defendant and any other person which related to the application or non-application of the Davis-Bacon Act to any undertaking of defendant or of any of its employees.

3. Each and every document, including without limitation the following categories of documents, which is related to any of the persons described in Request Number 1 or their work:

a. Job (or personnel) requisitions;

b. Notes or memoranda related to hiring or requests for hiring;

c. Job offers extended;

d. Resumes and applications received;

e. Contractual change requests;

f. Crew chief logs;

g. Payroll records;

h. Equipment failure reports;

i. Personnel records;

j. "Village Crier" issues;

k. Monthly summaries of manpower (sometimes called "monthly personnel reports");

l. Job descriptions;

m. Payroll authorizations;

n. The "personnel policy guide", (including superseded pages or issues);

o. "Procedures for experimenters" (including superseded pages or issues);

p. The Ledger of job requisitions;

q. The "Control list of employees";

r. Reviews or surveys of labor markets, salaries, area scales or wage determinations of any kind;

s. Minutes or notes relating to administrative meetings.

4. Each and every document related to correspondence between defendant and any other person relating to: any of the persons described in Request No. 1 or their jobs or similar positions (whether or not actually created or filled); the application of the Davis-Bacon Act to any transaction or event; or the subject matter of this lawsuit.

5. Each and every document setting out the organization and structure of the defendant's operations at Fermi National Accelerator Laboratory.

6. Each and every statement obtained from any person who may be called as a witness by defendant herein.

MOTION TO SHORTEN TIME FOR PRODUCTION.

Plaintiffs move the Court pursuant to Rule 34(b) of the Federal Rules of Civil Procedure to shorten the time within which defendant must comply with their attached Amended First Request to Produce to fifteen days after service thereof.

In support of this motion, plaintiffs state as follows:

1. The documents requested must be examined so that further discovery may proceed.

2. The Court has several times stated its desire that discovery be expedited herein.

3. The hastening of the requested production will facilitate the completion of discovery.

Wherefore, plaintiffs pray the Court to order defendant to comply with plaintiffs' Amended First Request to Produce within fifteen days after service thereof.

ANSWER TO PLAINTIFF'S MOTION FOR A SHORTENED TIME FOR PRODUCTION OF DOCUMENTS;

MOTION FOR STAY OF PRODUCTION PENDING RESOLUTION OF LEGAL ISSUES; ALTERNATE MOTION FOR PROTECTIVE ORDER.

Defendant hereby answers Plaintiff's Motion as follows:

A. DEFENDANT CANNOT PRODUCE ALL OF THE DOCUMENTS REQUESTED WITHIN THE TIME SOUGHT.

Plaintiff requests all documents relating to "all persons employed or sought to be employed by Defendant as Technicians or any functional equivalent thereof," and other vaguely described persons. Request, ¶'s I, III 1.a.b., 3, 4. Plaintiff lists well over one hundred twenty (120) species of documents as being included in the Request. Request, ¶'s I A.1., III 3.

Many species cover thousands of individual documents: *e.g.*, crew chief logs, equipment failure reports and cancelled checks which reflect daily occurrences (*cf.* Orr deposition, pp. 59-61).

Defendant employs more than four hundred (400) technicians (Marofske deposition, p. 12). Adding persons who have since terminated their employment, the total number is well over five hundred (500) (*cf.* Marofske deposition, p. 28). Depending on how broadly one construes the vague reference "or functional equivalent thereof," many more persons could be covered (*cf.* Huson deposition, pp. 1-13).

Defendant, therefore, is being requested to produce literally tens of thousands of documents.

Gathering such material obviously would require thousands of man-hours. To compress such time within the bounds of the normal time allowed for production—and, *a fortiori*, within the time now sought by the Plaintiff—would thoroughly disrupt operations and would indeed be altogether impossible.

In addition, enormous costs would be incurred for personnel, duplication and transportation expenses.

Accordingly, Defendant urges the Court to deny Plaintiff's Motion for expedited production of documents because of patent absurdity and because of sheer impossibility.

B. DEFENDANTS' REQUEST SHOULD BE STAYED.

The great bulk of documents covered in Plaintiff's Request relate to "Technicians." However, "Technicians" are not included in the class certified by the Court's Order of August 4, 1976. That Order limited the class to:

> "All '*mechanics and/or laborers*' employed by defendant pursuant to Contract No. AT(49-8)-3000 . . . as stated and defined in the Davis-Bacon Act, 40 U. S. C. 276a, *et seq.*" (Emphasis added.)

Accordingly, Plaintiff's request for documents rests on a bald presumption that "mechanics and/or laborers" and "Technicians" are synonymous. That presumption is patently inaccurate.

Authority to resolve questions concerning application of the Davis-Bacon Act to various classes of employees and work is vested exclusively in the contracting agencies with appeal to the Secretary of Labor and U. S. Department of Labor Wage Appeals Board. *Gillioz* v. *Webb*, 99 F. 2d 585, 586-587 (5th Cir. 1938), *cited with approval, United States* v. *Binghamton Const. Co., Inc.*, 347 U. S. 171, 177, 74 S. Ct. 438, 441 (1954). *See also Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 127-129, 60 S. Ct. 869, 876-877 (1940). *And see* Judge McGarr's earlier ruling in this case:

> "The defendant . . . has soundly argued the position that the administrative determinations of the contracting agency are subject only to review by the Secretary of Labor, for purposes of an authoritative ruling (29 C. F. R. 5.12), and in certain instances are appealable to the Wage and

> Appeals Board of the U. S. Department of Labor. 29 C. F. R. 5.11; 41 C. F. R. 7.10. . . ."
>
> *Coutu* v. *Universities Research Association, Inc.*, 75 C 1129 (N. D. Ill. 1975) at p. 5.

By virtue of authoritative regulations at 41 C. F. R. §§ 9-18.700 through 9-78.750, scientific research and experimentation generally are excluded from Davis-Bacon Act coverage. The regulations are approved by the Secretary of Labor. 41 C. F. R. § 9-18.702-50.

In a case involving assembly of accelerator modules used in conducting high energy physics research, the Wage Appeals Board has ruled such work not covered by the Davis-Bacon Act. *In re Stanford Linear Accelerator Center*, WAB Case No. 65-2, 16 WH 851 (BNA, 1965).

Federal Procurement Regulations, moreover, clearly provide that the term "mechanics and laborers," as used in the Davis-Bacon Act:

> "does not apply to . . . office workers, superintendents, *technical engineers or scientific workers*. . . ."
>
> 41 C. F. R. § 1-18.701-1(b)(1) (Emphasis added).

The contract sued upon here—a contract between the United States and Defendant—expressly sets forth wage schedules for "technicians," in various grades. Contract No. AT(49-8)-3000 at Appendix B;* Marofske deposition at pp. 17-18, 28-30. The contract further provides that it does not contemplate that such employees will perform work which the Government determines to be governed by the Davis-Bacon Act. Contract, p. 54.

Government agents employed to enforce Davis-Bacon Act requirements have closely monitored Defendant's operations to ensure compliance (Orr Deposition, pp. 82-83). Testimony

* The Court previously has been supplied a copy of the contract. *See* Order dated October 5, 1975 at p. 4.

given by four (4) physicists who are members of Defendant's administration shows that Defendant employs technicians to assemble, operate and maintain scientific equipment used to assist scientists carry out experiments and research in the field of high energy physics; they testified that technicians perform no work falling outside the sphere of scientific work. Deposition of Dr. Orr, pp. 27-36, 42-44, 52-54, 62-64, 75-76; Deposition of Dr. Peoples, pp. 17-31, 45-49; Deposition of Dr. Huson, pp. 19-25, 29-35, 41-46; Deposition of Dr. Carrigan, pp. 33-40, 57-59.

No appeal has been made to the Labor Department Secretary or Board in connection with the classification of Defendant's technicians or the work they perform.

In short, this Court has confined the action to mechanics and laborers, as defined by the Davis-Bacon Act. Technicians are not in that category, as determined by the Contracting Agency, and regulations. No appeal has been taken to the Department of Labor, which is the sole forum to resolve issues of coverage. Material regarding technicians, therefore, cannot be pertinent to this action.

In addition, no technician employed by Defendant, except the named Plaintiff—has filed a written consent to become a party plaintiff as required by 29 U. S. C. § 256:

> "[I]n the case of a collective or class action instituted under the Fair Labor Standards Act of 1938, as amended, or the Bacon-Davis Act, it shall be considered to be commenced in the case of any individual claimant—
>
> > "(a) on the date when the complaint is filed, if he is specifically named as a party plaintiff in the complaint and his written consent to become a party plaintiff is filed on such date in the court in which the action is brought; or
> >
> > "(b) if such written consent was not so filed or if his name did not so appear—on the subsequent date on which such written consent is filed in the court in which the action was commenced."

By virtue of that statute, technicians cannot be deemed parties to the action. *Compare, Kulik* v. *Superior Pipe Specialties Co.*, 203 F. Supp. 938 (N. D. Ill. 1962) at Conclusion of Law No. 5, p. 941.

Since technicians are not covered by the class certification, have not been determined by the Secretary of Labor to be "mechanics or laborers," and have not—with one exception only—entered the action, and in view of the enormous expense, and dislocation which Defendant would suffer if required to honor Plaintiff's request, it is submitted, respectfully, that the Court should order a stay pending resolution of the question whether "technicians" are or are not involved in the action.

C. ALTERNATIVE MOTION FOR PROTECTIVE ORDER.

Contingent on the Court's action on the points raised above, Defendant alternately moves the Court for a protective order pursuant to Rule 26(c), as follows:

(a) that Defendant be relieved of any obligation to produce documents respecting any "technician" for the reasons set forth above;

(b) that Defendant be relieved of any obligation to produce routine payroll records, cancelled checks, personnel files, or, without limit, any documents relating to employee hiring, hours worked, wages, terms and conditions of employment, termination, and evaluation for the reason that Defendant is prepared to enter into appropriate stipulations concerning such matters, to the extent they are deemed by the Court relevant;

(c) that Defendant be relieved of any obligation to produce documents relating to any person, however classified, who has not filed a consent, and respecting any matter arising more than two (2) years prior to

any filing of such person's consent in the future as required by 29 U. S. C. § 256, for the reasons set forth in that statute and explained by the Court in *Kulik* v. *Superior Pipe Specialties, supra*;

(d) that Defendant be relieved of any obligation to produce documents as described in Request, Item No.'s III 2. and 4., for the reasons that such Request Items are patently vague, uncertain, indefinite, and would require Defendant to make assumptions. Defendant is willing to produce "Requests for Davis-Bacon Determination" filed by it with the Government, covering work performed within the limitation period specified in 29 U. S. C. § 255. *See* Kennedy deposition, Plaintiff Exhibit 1;

(e) that Defendant be relieved of any obligation to produce documents as described in Request Item No.'s III 2., 4. and 6. for the reasons set forth in Federal Rule 26(b)(3);

(f) that Defendant be relieved of any obligation to produce other than official documents made and filed in the normal course of Defendant's operations or documents specifically identified as to date, location and person by Plaintiff for the reason that the Request is otherwise too vague, and would cause Defendant undue burden and expense;

(g) that Defendant be relieved of any obligation to produce more than one of the documents described in Request Item No. III as defined in Part I of the Request, for the reason that the Request is otherwise unduly burdensome and expensive;

(h) that Plaintiff be directed to advance costs in excess of two hundred dollars ($200.00) reasonably anticipated to be incurred by Defendant in honoring the Request, or post a bond for their payment, should

Defendant ultimately prevail for the reason that Defendant should not be expected to advance enormous costs unsecured, in light of the dubious legal merit to Plaintiff's claim;

(i) that Defendant be permitted to construe all requests as being limited generally by the provisions of the Davis-Bacon Act and Regulations promulgated thereunder, for the reason that otherwise the Request particularly that part set forth in Item III 1.b otherwise is too vague and indefinite; and

(j) that Defendant not be required to produce any document owned by the United States, or any other entity, or person, other than Defendant.

ORDER ENTERED DECEMBER 21, 1976

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge, Honorable George N. Leighton

Cause No. 75 C 1129 Date December 21, 1976

Title of Cause Stanley E. Coutu, vs. Universities Research Association, Inc., a corporation

Brief Statement of Motion: Motion to Shorten Time for Production

Names and Addresses of moving counsel: Arnold and Kadjan 11 South LaSalle Street; Chicago, Illinois 60603 Representing Plaintiffs

Names and Addresses of other counsel entitled to notice and names of parties they represent.: Robert E. Mann, Esq. Seyfarth, Shaw, Fairweather & Geraldson 55 East Monroe Street Chicago, Illinois 60603

Defendant

DOCKETED

Leighton. J.

December 27, 1976

Notes: The defendants shall file their Answer to the Motion to shorten time for production on or before January 3, 1977. The reply thereto shall be filed on or before January 17, 1977. The Court will rule on said Motion on February 18, 1977, and cause is not set for a pre-trial conference on said February 18, 1977 at 9:00 A. M.

ORDER ENTERED FEBRUARY 18, 1977

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS
EASTERN DVISION

Name of Presiding Judge, Honorable George N. Leighton

Cause No. 75 C 1129 Date 2-18-77

Title of Cause Stanley E. Coutu v. Universities Research Association, Inc.

Brief Statement of Motion: Pretrial Conference

DOCKETED

LEIGHTON, J.

February 23, 1977

NOTES: P/T completed. Defendant to file motion for summary judgment on or before 3-18-77; Plaintiff to answer on or before 3-28-77; defendant to reply by 4-4-77; court to rule on 5-4-77. Status report of 3-4-77 vacated and reset for 5-13-77 at 2:00 P. M.

MOTION FOR SUMMARY JUDGMENT

Defendant moves the Court to enter judgment for Defendant, on the ground that no material issue of fact exists and Defendant is entitled to judgment as a matter of law. In support, Defendant states:

(1) This action was brought to enforce an alleged contract based upon provisions of the Davis Bacon Act, 40 U. S. C. 276(a), pursuant to which Plaintiff allegedly performed work.

(2) The only material issue is whether or not Defendant has entered into such a contract.

(3) The only contract cited in the pleadings or referred to in discovery is Contract No. AT(49-8)-3000, as amended, (now designated EY-76-C-02-3000) between Defendant and United States of America.

(4) This Court previously has ruled that Contract No. AT(49-8)-3000 will not support a contract action based upon the Davis-Bacon Act. *See* Memorandum Opinion and Order dated October 8, 1975 issued by Judge McGarr. The Court allowed the action to proceed thereafter solely to permit Plaintiff an opportunity to show, if he could, the existence of a contract incorporating Davis-Bacon Act stipulations.

(5) Plaintiff's counsel admitted at the pre-trial conference held February 18, 1977 that it cannot prove the existence of of any contract between the United States and Defendant, incorporating Davis-Bacon Act stipulations.

(6) There is in fact no contract between the United States and Defendant other than Contract No. AT(49-8)-3000. *See*: Affidavit of John R. Fraizer, Chief Legal Counsel of Fermi National Accelerator Laboratory, attached.

(7) As a matter of law, Defendant cannot be held liable on a contract which does not exist.

---

* The Court previously has been supplied a copy of Contract No. AT(49-8)-3000.

(8) The Court is without jurisdiction to fashion a contract for the parties.

A memorandum of points and authorities in support of this Motion is filed herewith.

Wherefore, Defendant prays that it be granted a Summary Judgment.

AFFIDAVIT OF JOHN R. FRAZIER IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

JOHN R. FRAZIER, the undersigned, being first duly sworn upon his oath, deposes and states that if called to testify in this matter based on personal knowledge, he would state as follows:

1. Affiant is and at all pertinent times to the Complaint herein has been, Chief Legal Counsel for the Fermi National Accelerator Laboratory ("Fermilab"). Pursuant to his duties as Chief Legal Counsel, Affiant is and would be familiar with all contracts and their terms and provisions, Defendant has with the United States or any government agency acting on its behalf.

2. Contract No. EY-76-C-02-3000, as amended (formerly designated as AT(49-8)-3000), is the only contract Defendant has or ever had with the United States or any government agency acting on its behalf.

3. No Davis-Bacon Act, 49 U. S. C. § 276a, *et seq.*, stipulations requiring the payment of prevailing wages have ever been made a part of or incorporated in said Contract No. EY-76-C-02-3000.

4. Further the Affiant sayeth not.

/s/ John R. Frazier
John R. Frazier

Subscribed and Sworn to before me this 16th day of March, 1977.

/s/ Joyce E. Sobinsky
Notary Public

No. 78-1945

In the
Supreme Court of the United States
OCTOBER TERM, 1978

UNIVERSITIES RESEARCH ASSOCIATION, INC.,
Petitioner,

vs.

STANLEY E. COUTU,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HUGH B. ARNOLD
DANIEL N. KADJAN
ARNOLD AND KADJAN
11 South LaSalle Street
Chicago, Illinois 60603

ROBERT JAY NYE
NYE AND NYE
420 North Euclid Avenue
Oak Park, Illinois 60302

Attorneys for Respondent Stanley E. Coutu, and the Respondent Class.

The Scheffer Press, Inc.—(312) 263-6850

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B. Where a government contract clause is required by statute or by procurement regulation to be included in a government contract, that clause is deemed incorporated, as a matter of law, into the contract. The Davis-Bacon Act minimum wage stipulation is part of the subject government contract by operation of law, and employees who perform Davis-Bacon Act work must be paid the minimum wage rates established by the Secretary of Labor's published wage determinations 12

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1945

UNIVERSITIES RESEARCH ASSOCIATION, INC.,
Petitioner,

vs.

STANLEY E. COUTU,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Stanley E. Coutu, on his behalf and on behalf of the class he represents,[1] opposes the Petition for Writ of Certiorari filed by petitioner on June 30, 1979.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, reversing a summary judgment granted on motion of the petitioner and remanding for further proceedings, is reported at 595 F.2d 396 (April 4, 1979) and is reproduced as Appendix A to the Petition. The two unreported memorandum orders by different District Judges referred to in the Court of Appeals

---

[1] The respondent class has been certified. See *Coutu v. Universities Research Association, Inc.*, 595 F.2d 396, 397 (C.A. 7, 1979), and Appendix A at A2-A3.

opinion, are printed in their entirety as Appendix B and Appendix C to the Petition.[2]

QUESTION PRESENTED

Respondent submits that the petition does not contain, as required by Supreme Court Rule 23-1(c), a question presented "expressed in the terms and circumstances of the case." Without waiver of this point or of his position that there are no special and important reasons for the grant of certiorari in this case, respondent suggests that the appropriate question would be:

Is a prime contractor under a government contract exempted as a matter of law from the statutory duty to pay Davis-Bacon Act (40 U.S.C. §§276a-276a-7)[3] minimum wages to its own employees, and is that government contract therefore insufficient in law as a basis for recovery of those unpaid minimum wages, when:

(a) the government contract expressly procures "construction, alteration and/or repair" work (see 40 U.S.C. §276a),

---

[2] The appeal was from a summary judgment allowed by the second District Judge, based on an affidavit of petitioner's counsel that no Davis-Bacon Act contract clause (see contract clauses specified by the Department of Labor, 29 C.F.R. §5.5(a)) requiring petitioner to pay Davis-Bacon minimum wages to its *own* employees for construction work was contained in petitioner's government contract (see Appendix C). The first District Judge had rejected that same contention when he denied petitioner's prior motion to dismiss the suit (see Appendix B).

[3] Certain portions of the Davis-Bacon Act, and a related section of the Copeland (Anti-Kickback) Act (40 U.S.C. §276c), are reproduced as Appendix D to the Petition.

(b) the prime contractor uses its own employees to perform certain construction work called for by the contract,

(c) the contract requires the contractor to include Davis-Bacon Act wage stipulations in subcontracts entered into for construction work, but contains no express stipulation requiring the contractor itself to comply with the Act as to construction work performed with its own employees, and

(d) applicable prevailing wage determinations by the Secretary of Labor are published in the Federal Register in accordance with law.

STATEMENT OF THE CASE

The petitioner's "Statement of the Case" contains a number of inaccuracies. Among them are the following:

(a) Petitioner's construction contractor status. *Petitioner's statement* characterizes its government contract as requiring it simply to "provide scientific and technical management services to the United States in connection with the construction and operation of Fermi National Accelerator Laboratory" (petition, at 3). *The fact is* that the government contract makes petitioner responsible for the "two categories of work contemplated by this contract" which are

> "a. Construction: Includes design, fabrication or procurement, erection, test and inspection, assembly and installation of the systems, components, buildings, etc., comprising the accelerator and the conventional facilities, as described * * * below.
>
> "b. Research and Development: * * *." [Appendix "A" to Contract, at p. 1.].

Further, by Supplemental Agreement dated April 6, 1972 "effective as of July 1, 1971" the contract was revised, certain prefatory Recitals stating, *inter alia,*

> "The Association has heretofore undertaken, pursuant to the terms and conditions of the basic Contract No. AT (49-8)-3000, the design and construction of an accelerator and related facilities * * *
>
> "Accordingly, this contract sets forth the terms and conditions, and the purposes and policies under which the Association shall continue the design and construction of the accelerator and related facilities * * *." [Modification No. 14 to Contract No. AT (4908)-3000, at p. 1.]

And if that were not enough to demonstrate that petitioner is the contractor primarily responsible for the construction called for by the contract, we also have petitioner characterizing itself as *"This Federally assisted construction contractor"* in a November 25, 1968 certification to the government that it does not maintain segregated facilities for its employees "under its Prime Contract No. AT (4908)-3000".[4]

---

[4] The contract, originally dated January 23, 1968, "effective as of January 5, 1967" is not in the trial court record and, of course, not therefore in the Record on Appeal in the Court of Appeals. It, or portions of it, may have been furnished to the district court by the petitioner, although not to the respondent or the respondent class. Respondent has secured a copy of the contract, or portions of it, through Freedom of Information Act procedures. 5 U.S.C. §552 *et seq.* Discovery procedures initiated by the respondent and his class prior to submission by petitioner of the summary judgment motion which resulted in the district court judgment reversed in this case by the Seventh Circuit, including procedures for production of documents (see Appendices filed in Court of Appeals, Appendix F, at 39-44, entitled "Amended First Request to Produce"), were stayed pending

(b) The summary judgment legal issue. *Petitioner's statement* asserts that its motion for summary judgment was predicated upon the failure by respondent to show that "the [contracting] agency had rendered a Davis-Bacon Act coverage determination regarding work he performed" and that "Petitioner's general counsel submitted an affidavit that no such determination had been made" (petition, at 5). *The fact is* that this was not and had never been the issue on the summary judgment motion, and petitioner thus misquotes the contents both of its summary judgment motion and its general counsel's affidavit submitted in support. The sole issue on the summary judgment motion, the granting of which was reviewed in and reversed by the Seventh Circuit, was

> "whether or not [petitioner] has entered into [a contract based upon provisions of the Davis-Bacon Act]" (Motion for Summary Judgment, paragraph "(2)").[5]

And petitioner's general counsel's affidavit—which petitioner describes as supporting its claim that "the agency had rendered [no] Davis-Bacon Act coverage determina-

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(4 Continued)
disposition of the said motion and determination of the legal question presented. See also *Coutu* opinion, 595 F. 2d 396, at 397, and Appendix A at A2-A3. ("Discovery was apparently stayed in February 1977" and fn. 3 "Defendant's brief nowhere disputes the stay. An earlier discovery stay was ordered by Judge McGarr on December 22, 1975"). It is apparent that there may be other agreements and documents, yet to be discovered, concerning petitioner's Davis-Bacon duties.

[5] Paragraph "(2)" of the Motion for Summary Judgment reads in full that: "(2) The only material issue is whether or not Defendant has entered into such a contract." (*Appendices* filed in the Court of Appeals, Appendix I, at 47).

tion regarding work [respondent] performed" (petition, at 5)—speaks only of the absence of express Davis-Bacon Act wage stipulations from petitioner's government contract. It says nothing at all about determinations made or not made by the contracting agency concerning the contract construction work or concerning respondent's share in that work. It simply says:

> "3. No Davis-Bacon Act, 49 U.S.C. §276a, *et seq.*, stipulations requiring the payment of prevailing wages have ever been made a part of or incorporated in said contract No. EY-76-C-02-3000.
>
> "4. Further the affiant sayeth not." (*Appendices* filed in the Court of Appeals, Appendix J, at 49).

Finally, the district judge who allowed the summary judgment which the Seventh Circuit reversed, was also under no misconception about the legal issue he was deciding. The actual question was whether petitioner is exempt as a matter of law from the statutory duty to pay Davis-Bacon Act minimum wages for the sole reason that its government contract does not expressly require it to comply as to construction work performed with its own employees. Granting that judgment, he said:

> "This court concludes that there is no issue of material fact that this contract fails to contain the requisite Davis-Bacon Act specifications essential for maintenance of the claim stated in Count II. Accordingly, this court enters judgment for defendant on Count II of the complaint and that count is dismissed." (See *Memorandum Order*, Appendix C at A27).

(c) Alleged search for so-called "coverage determinations". *Petitioner's statement* further asserts, without any warrant in the record, that respondent has attempted to

discover some Davis-Bacon Act "coverage determination regarding work [respondent] performed [but] found none" (petition, at 5). *The fact is* that respondent, individually and on behalf of his class, relies on the explicit "coverage determination" of the Davis-Bacon Act itself. Neither the rights of the respondent under the Act—nor the rights of the respondent class—depend upon the existence of a contracting agency (AEC/ERDA/DOE) ruling that this respondent was performing Davis-Bacon work. Further, it is clear that were contracting-agency "coverage" rulings required to entitle respondent or his class to the Davis-Bacon Act minimum wage, the stay of discovery pending disposition of the summary judgment legal issue, previously described (see fn. 4, *supra*), has made it procedurally impossible at this point in the proceedings to establish their existence and application to the work assignments actually given to respondent and his class by the petitioner-employer-contractor.[6]

(d) Did the Seventh Circuit "alter" or "revise" the contract? *Petitioner's statement* asserts—as if it were a matter of fact—that the Court of Appeals "held that

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[6] Of course, respondent would welcome the existence of AEC/ERDA/DOE rulings that he and the others in his class were performing Davis-Bacon Work. At this point, limited discovery has revealed a number of items recommending that certain work projects under the prime contract be treated as Davis-Bacon Act work. Discovery has not yet proceeded to the point where it can be learned whether respondent and other class members were assigned some of that work. However, the question of the existence and availability of those items and that information, is quite different from the question actually posed by the summary judgment motion and actually ruled on by the district and circuit judges who considered the summary judgment issue in this case.

the District Court did have jurisdiction * * * to revise the contract" (petition, at 5). This assertion, with the single substitution of the word "alter", draws our attention once again to petitioner's "Question Presented" (petition, at 2), upon the propriety of which respondent has previously commented (this brief, at 2). It is of course understandable that a petitioner seeking certiorari might harshly characterize the adverse decision. But it is respectfully submitted that a petitioner should, at least in his "Statement of the Case", state the facts—not his interpretation, nor an altered or revised version of the facts. *The fact is* that the Seventh Circuit applied long-settled principles of statutory construction to the provisions of the Davis-Bacon Act, and equally-well-settled principles of contract (and government contract) interpretation to the contract here in question. *The fact is* that the Seventh Circuit did not "alter" or "revise" that contract. *The fact is* that the court held, *inter alia,* as follows:

> "[H]ere, the provisions of the Davis-Bacon Act must be read into Article XXXIII [the 'Labor Provisions' article of the contract] when, pursuant to a contract requiring Davis-Bacon Act work, the defendant [petitioner] performs 'construction, alteration, and/or repair * * * of public buildings or public works of the United States * * * which requires or involves the employment of mechanics and/or laborers.' * * * 40 U.S.C. §276a.
>
> "Indeed, in a January 23, 1973, letter from the Atomic Energy Commission's Chicago Operations Office Manager to the president of the defendant, both those parties foresaw that conditions might arise which might make it necessary for the defendant to perform Davis-Bacon Act work and in such instance to modify the contract to incorporate the

Davis-Bacon Act provisions relative to labor and wages. Since under *McDaniel I* [*McDaniel* v. *University of Chicago*, 512 F.2d 583 (C.A. 7, 1975), reaffirmed on remand, 548 F.2d 689 (C.A. 7, 1977), certiorari denied, 434 U.S. 1033, 98 S.Ct. 765, 54 L.Ed. 2d 780] the contract was already so modified by operation of law, amendments to the contract were not needed to accomplish that result.

"*McDaniel* was not an isolated instance of reading applicable statutory requirements into government contracts. We were merely following precedents established as early as 1827 and applied consistently thereafter. [footnote citations] Because the provision to pay the prevailing wage rate was incorporated by operation of law, the affidavit relied upon by the district court to the effect that no Davis-Bacon Act 'stipulations requiring the payment of prevailing wages have ever been made a part of or incorporated in' the contract * * * is insufficient to support the grant of summary judgment. Therefore it was unnecessary for plaintiff [respondent] to tender a counter-affidavit.

"It is uncontested that the Secretary of Labor has published general wage determinations in decisions published in the Federal Register that are applicable to labor on government projects in Kane County, Illinois, where the Fermi Laboratory is located and where the defendant's alleged construction activity has been performed. [footnote citations to wage determinations]. Therefore the district court was mistaken in concluding that to sustain plaintiff's position would require it to make wage determinations for the parties." [*Coutu* v. *Universities Research Association, Inc.*, 595 F.2d 396, 399-400 (C.A. 7, April 4, 1979); also Appendix A at A7-A9].

THERE ARE NO SPECIAL AND IMPORTANT REASONS FOR THE GRANT OF CERTIORARI IN THIS CASE.

I.

THE COURT OF APPEALS HAS NOT DECIDED A QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT. IT HAS NOT DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

A. The Seventh Circuit was manifestly correct when it ruled that "the provisions of the Davis-Bacon Act must be read into [the 'Labor Provisions' article of this government contract] when, pursuant to a contract requiring Davis-Bacon Act work, the defendant [petitioner] performs 'construction, alteration, and/or repair * * * of public buildings or public works of the United States * * * which requires or involves the employment of mechanics and/or laborers.'"

Contrary to the petitioner's claim, the ruling of the Seventh Circuit is neither "novel" nor "unprecedented" by prior decisions of this Court and of other courts and authorities in the area of contract law generally, and public contract law in particular. Contrary to petitioner's assertion, the Seventh Circuit's decision is not a "departure"—much less a "wholesale departure"[7]—from existing law relative to government contracting.

The Court of Appeals has followed established precedent existing in this Court since at least 1827 (e.g., "the law of the contract * * * forming a part of it")[8]. The

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[7] See petition, at 6.

[8] *Ogden* v. *Saunders,* 25 U.S. (12 Wheat.) 212, 6 L.Ed. 606, 621-622 (1827), cited by the Court of Appeals at 595 F.2d 396, 400. See Appendix A at A8.

Court of Appeals has complied with mandate of Congress consistently reaffirmed by Congress and by this Court since 1931 that the Davis-Bacon Act is to be applied to "protect * * * employees from substandard earnings by fixing a floor under wages on Government projects".[9] And the Court of Appeals has recognized the express contractual intent, found in the petitioner's 1968 government contract and in contract documents since that date, that Davis-Bacon requirements must apply concerning Davis-Bacon work contemplated by that prime contract.[10]

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[9] *United States* v. *Binghamton Construction Co.*, 347 U.S. 171, 177, 74 S.Ct. 438, 441, rehearing denied 347 U.S. 940, 74 S.Ct. 625 (1954).

[10] It is, indeed, impossible to conceive how petitioner can at this date claim lack of knowledge that in its capacity as contractor or subcontractor it must pay Davis-Bacon minimum wages to its employees whom it assigns to do Davis-Bacon work, when (a) the statute says it, (b) the cases say it, (c) the Department of Labor regulations say it, (d) the G.S.A. and AEC/ERDA/DOE regulations say it, (e) the contract itself says that it must include Davis-Bacon clauses in subcontracts it enters into for others to do such work, and (f) documents involving the contract say that Davis-Bacon stipulations are to apply if its own employees do such work.

B. Where a government contract clause is required by statute or by procurement regulation to be included in a government contract, that clause is deemed incorporated, as a matter of law, into the contract. The Davis-Bacon Act minimum wage stipulation is part of the subject government contract by operation of law, and employees who perform Davis-Bacon Act work must be paid the minimum wage rates established by the Secretary of Labor's published wage determinations.

1. **The Davis-Bacon Act mandatory requirement.** Section 1 of the Davis-Bacon Act (40 U.S.C. §276a) requires, *inter alia,* that

> "every contract * * * **shall** contain a stipulation that the contractor or his subcontractor shall pay all mechanics and laborers * * * the full amounts accrued at time of payment, computed at wage rates not less than those [determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the (locality) in which the work is to be performed]. (Emphasis supplied).

The requirement that every contract involving construction on government projects **shall** contain the required minimum wage stipulation, cannot be construed as anything but mandatory. As was recently said in *Assn. of American Railroads* v. *Castle,* 562 F.2d 1310, 1312 (C.A. D.C. 1977), "The word 'shall' is **the language of command in a statute,** and there is no doubt that the Congress has commanded [what the statute requires]."

But we need not rely alone on mere, albeit accurately applicable generalizations. This Court has *already* authoritatively construed the Davis-Bacon Act as mandatory. In

United States v. *Binghamton Construction Co.*, 347 U.S. 171, 74 S.Ct. 438 (1954), rehearing denied 347 U.S. 940, 74 S.Ct. 625, a decision in which—as here—a government contractor claimed that the wage rates expressly contained in its contract amounted to a binding representation or warranty as to the wage rates which it must actually pay its workers for Davis-Bacon work, it was declared (347 U.S. at 172, 74 S.Ct. at 439):

> "**The Davis-Bacon Act requires that the wages** of workmen on a Government construction project **shall be 'not less' than the 'minimum wages'** specified in a schedule furnished by the Secretary of Labor." [Emphasis supplied.]

And, concluding—as the Seventh Circuit has concluded in the case at bar—that the contractor's contention must be rejected, this Court further noted (347 U.S. at 178, 74 S.Ct. at 442):

> "On its face, the Act is a minimum wage law designed for the benefit of construction workers. **The Act does not authorize or contemplate any assurance** to a successful bidder **that the specified minima will in fact be the prevailing rates.** Indeed, its requirement that the contractor pay 'not less' than the specified minima presupposes the possibility that the contractor may have to pay higher rates. Under these circumstances, **even assuming a representation by the Government as to the prevailing rate, respondent's reliance on the representation** in computing its bid **cannot be said to have been justified.** [Emphasis supplied.]

Further, it is not only the Davis-Bacon Act itself and the decisions of this Court construing it, which mandate the inclusion of the minimum wage stipulation in our contract. The regulations issued by the Secretary of Labor

pursuant to 40 U.S.C. §276c[11] and Reorganization Plan No. 14 of 1950,[12] complement the requirements of the Act by commanding a like incorporation of the applicable regulations, among which are included the standard contract clauses which stipulate compliance with the Act's minimum wage obligations. Thus the Secretary's regulation §3.11 (29 C.F.R. §3.11 (1978 ed.)) reads:

> **§3.11 Regulations part of contract**
>
> "All contracts made with respect to the construction, prosecution, completion, or repair of any public building or public work or building or work financed in whole or in part by loans or grants from the United States covered by the regulations in this part **shall** expressly bind the contractor or subcontractor to comply with such of the regulations in this part as may be applicable. In this regard, see §5.5(a) of this subtitle [which contains the specific contract provisions]." [Emphasis supplied.]

Here, too, there is no doubt that "the verb 'shall' in the regulation is mandatory", *Ainslie Corp.* v. *Middendorf*, 381 F.Supp. 305, 308 (D.Mass. 1974).

2. Incorporation of Mandatory Clauses—the "Christian Doctrine". It is clear that the Davis-Bacon Act minimum wage provisions represent long-standing and fundamental procurement policies of the United States. The cases which deal with government contracts teach that contract clauses made mandatory by **procurement regulation,** are incorporated into government contracts as a matter of law. Is it not even more certain that con-

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[11] Section 2 of the Copeland (Anti-Kickback) Act of June 13, 1934, c. 482, 48 Stat. 948; as amended May 24, 1949, c. 139, §134, 63 Stat. 108, and August 28, 1958, P.L. 85-800, §12, 72 Stat. 967.

[12] 5 U.S.C. §903 note, 15 F.R. 3176, 64 Stat. 1267.

tract clauses made mandatory by **statute** are so incorporated as a matter of law! Dees and Ginsburg, *Contract Interpretation and Defective Specifications* at 4 (Government Contracts Monograph No. 4, 1975 Edition; The George Washington University); *G.L. Christian and Associates* v. *United States,* 312 F. 2d 418, 160 Ct. Cl. 1, opinion on reargument denied 320 F. 2d 345, 160 Ct. Cl. 58, certiorari denied 375 U.S. 954 (1963), rehearing denied 376 U.S. 929, 377 U.S. 1010 (1964) See also, e.g., *United States* v. *New Orleans Public Service, Inc.,* 553 F.2d 459 C.A. 5, 1977); *City of Tullahoma* v. *Coffee County,* 204 F. Supp. 794 (E.D. Tenn. 1962), rev'd on other grounds 328 F. 2d 683 (C. A. 6, 1964).

In Dees and Ginsburg, *Contract Interpretation and Defective Specifications* (Government Contracts Monograph No. 4, 1975 Edition; The George Washington University), the authors note:

> "Surprisingly, there are very few federal statutes which directly affect the performance of a Government contract. There are, of course, the basic statutes authorizing the Government to enter into contracts and placing certain limitations on the methods of contracting. * * * Federal statutes and executive orders affecting performance include those that require equal employment opportunity requirements on contractors doing business with the Government, those that impose certain **minimum standards for wages** and working conditions of employees working for Government contractors [citing the Walsh-Healey Act, 41 U.S.C. §§35-45; the Davis-Bacon Act, 40 U.S.C. §276(a); the Service Contract Act of 1965, 41 U.S.C. §§1-57; the Contract Work Hours and Safety Standards Act, 40 U.S.C. §§327-333] and those which require protection of the environment. * * *" [Ibid., at 1-2; emphasis supplied.]

Then, speaking of the binding effect of statutory requirements and implementing regulations, we are reminded:

> "Statutory requirements and regulations which implement statutory requirements have the **force and effect of law**. Accordingly, contracts made in violation of such requirements are illegal. * * *" [Ibid., at 3.]

And, finally, concerning the question whether government contracts are to be interpreted as incorporating mandatory clauses specified by law, in order to preclude invalidation of those contracts for violation of statutory and regulatory requirements or otherwise:

> "It is common for Government contracts to include standard clauses and specifications by reference. These should present no problem to the contractor who has read the contract and is aware that these additional provisions are binding on the parties. A problem of interpretation does arise, however, when one party seeks to incorporate a contract clause which is not referenced in the contract but which is required by regulation.
>
> "In *G. L. Christian & Associates* v. *United States,* the Court of Claims held that the Termination for Convenience clause which had been consciously omitted by the Government (and the contractor) had the force and effect of law and was incorporated in the contract as a matter of law. The Court emphasized the fact that **pertinent regulations made the incorporation of the clause in a contract mandatory** and that a Termination for Convenience clause was historically an important component of a Government contract.
>
> "How broad is the '*Christian* doctrine' and does it apply to all mandatory clauses or only to certain ones? Until recently, the prevailing view was that the *Christian* doctrine applied to all provisions of

> the regulations which make the use of a particular contract clause mandatory. However, there is a growing minority view which believes that the *Christian* doctrine should be restricted to the incorporation of only those mandatory clauses which implement **long-standing and fundamental procurement policies of the United States.**" [Ibid., at 4; emphasis supplied.]

Thus, under both the prevailing view and the so-called developing minority view, we must recognize that the Davis-Bacon Act minimum wage stipulations are part of the subject government contract and binding on the petitioner.

So far as the *Christian* case opinions themselves are concerned (*Christian I,* 312 F.2d 418, 160 Ct.Cl. 1 (1963); and *Christian II,* 320 F.2d 345, 160 Ct.Cl. 58 (1963)), it should be noted that there the contractor's prime objection to the "incorporation" doctrine was that the subject contract clause was required only by "pre-existing **regulation**", the court pointing out that there was *no* question but that "if a **statute** requires the inclusion of a termination clause, such a provision would be read into the agreement **whether the negotiators put it there or not**". (320 F.2d at 350; emphasis supplied). And, speaking further concerning the "incorporation" doctrine, the Court of Claims said (320 F.2d at 350-351):

> "[A]s the Supreme Court cases demonstrate, 'mere' regulations can supersede state laws which would otherwise control; giving the regulations the status of law equates them fully to federal legislation. **The concept of such incorporation is not novel.** A well-known example is Executive Order No. 9001 (implementing the First War Powers Act), supra, which expressly required, without *specific* statutory foundation, that World War II contracts should contain

> a covenant-against-contingent-fees, as well as an anti-discrimination clause. **If the contracts were to be deemed valid, these articles had to be read as part** of all war procurement agreements, whether or not they were physically incorporated. * * * It was important then, and it is important now, that **procurement policies set by higher authority not be avoided or evaded** (deliberately or negligently) **by lesser officials, or by a concert of contractor and contracting officer. * * * Obligatory Congressional enactments are held to govern federal contracts because there is a need to guard the dominant legislative policy against** *ad hoc* **encroachment or dispensation by the executive** [citation].
>
> "Like other individuals who deal with the Federal Government [citation], potential contractors can validly be bound to discover the published directives telling them the limits and the scope of the agreements the Government can make. Our concern is not at all whether the policy of embodying mandatory contractual provisions in regulations is the best one. Our special interest is only the legality of such a practice, and we hold that, in the procurement field as in others, an authorized regulation can impose such peremptory requirements on federal officials and those who seek to enter into transactions with the Government." [Italics by the court; other emphasis supplied.]

See too, *e.g.*, *United States* v. *New Orleans Public Service, Inc.*, 553 F.2d 459, 469 (C.A. 5, 1977), holding "**the clause is incorporated into the contract, even if it has not been** expressly included in a written contract or **agreed to by the parties**; *Compagnie Generale Transatlantique* v. *American Tobacco Co.*, 31 F.2d 663, 666 (C.C.A. 2, 1929), holding that "a lawful statute in force at the time the contract was made is read into the contract and becomes part of it" and "Such a **contract must be and is deemed**

to be modified to conform to the statute"; 3 *Corbin on Contracts,* §551, at 200-201 (1960 ed.), noting the same result "even though the parties **know nothing** of the statute and do not include the provision, and **even though they know of it and expressly agree upon the exact contrary"**; 17A Corpus Juris Secundum, *Contracts,* §330, at 301 (1963 ed.), noting that "where a provision is integrated into a contract by force of statute, as a matter of public policy, it must be interpreted and given effect in accordance with the intention of the legislature, irrespective of how the contractors understood it".

Also of particular significance on this point is this Court's opinion in *Hartford Accident & Indemnity Co.* v. *N. O. Nelson Mfg. Co.,* 291 U.S. 352, 54 S.Ct. 392 (1934), where the Court required that a contractor's bond be construed to include a clause required by state statute but omitted from the express terms of the bond, and said:

> **"All that the statute does** by force of section 3 **is to standardize the form,** at least in some particulars, when bonds are freely given, and to define the consequences attaching to the standard thus prescribed. * * * The business of insurance is one peculiarly subject to supervision and control [citations.] The Fourteenth Amendment does not make it necessary that materialmen and **laborers** shall be deprived of **fair protection** to the end that sureties for profit may be given an opportunity to diversify their bonds.
>
> "Liberty of contract is not an absolute concept. [citations.] It is relative to many conditions of time and place and circumstance. The Constitution has not ordained that the forms of business shall be cast in imperishable moulds. There is no question here of the impairment of the obligation of a contract by later legislation. The act assailed by the appellants was in existence for many years before the bond in

suit was written. Principal and surety in writing it became **subject to the statutes then in force, and by these they must abide.**" [291 U.S. at 359, 360-361; 54 S.Ct. at 395-396; emphasis supplied.]

C. A contractor takes a government contract subject to all applicable statutes. All statutes relating to the subject matter of the contract and existing at the time of contracting become a part thereof and must be read into the contract. Our petitioner contractor-employer is charged with knowledge that construction work performed by its employees is subject to the Davis-Bacon Act, and is obligated to pay the statutory wages rates.

1. Davis-Bacon Act is part of all government construction contracts. Whether or not the mandatory stipulation required by the Davis-Bacon Act to be included in "every contract * * * for construction, alteration, and/or repair, including painting and decorating, of public buildings or public works * * *" is deemed incorporated, as a matter of law, into the contract, it is basic hornbook law that the Davis-Bacon Act itself is a part of the contract. Statutes relating to the subject matter of a contract and existing at the time of execution of such contract, become a part thereof and must be read into the contract, as if they were expressly referred to or incorporated in its terms.

See, *e.g.*, *Woods* v. *Lovett*, 313 U.S. 362, 370, 61 S.Ct. 983, 987 (1941) ("laws which subsist * * * enter into and form a part of it, as if they were expressly referred to or incorporated in its terms"); *Home Building & Loan Assn.* v. *Blaisdell*, 290 U.S. 398, 429-430, 54 S.Ct. 231, 237 (1934) (concerning Minnesota Mortgage Moratorium Law); *Farmers' & Merchants' Bank* v. *Federal Reserve Bank*, 262 U.S. 649, 660, 43 S.Ct. 651, 655 (1923) ("This

principle embraces alike those laws which affect its construction and those which affect its enforcement or discharge"); *Hendrickson* v. *Apperson,* 245 U.S. 105, 38 S.Ct. 44, 45 (1917) (Kentucky statute authorizing appointment of special collectors); *Northern Pacific Ry. Co.* v. *Wall,* 241 U.S. 87, 91-92, 36 S.Ct. 493, 495 (1916) (Carmack Amendment to the Interstate Commerce Act); *Southern Surety Co.* v. *Oklahoma,* 241 U.S. 582, 587, 36 S.Ct. 692, 694 (1916) (Oklahoma enabling act and Oklahoma Constitution); *Armour Packing Co.* v. *United States,* 209 U.S. 66, 81, 82, 28 S.Ct. 428, 435, 436 (1907) ("the design of the statute to prohibit" "abuses of unequal rates"); *Antoni* v. *Greenhow,* 107 U.S. 769, 2 S.Ct. 91, 95 (1883) (rule applies to "those laws which affect its validity, construction, discharge, and enforcement"); *Walker* v. *Whitehead,* 83 U.S. 314, 317, 21 L.Ed. 357, 358 (1873) (Georgia statute held to impair obligation of contract); *United States ex rel. Von Hoffman* v. *City of Quincy,* 71 U.S. 535, 550 (1867) ("These are as much incidents and conditions of the contract as if they rested upon the basis of a distinct agreement"); *M'Cracken* v. *Hayward,* 11 L.Ed. 397, 399 (1844) ("laws in existence * * * measure of the obligation to perform"); *Ogden* v. *Saunders,* 6 L.Ed. 606, 621-622 (1827) ("the law of the contract * * * forming a part of it"; 17A C.J.S., *Contracts,* §330, at 295 (1963 ed.); 17 Am.Jur.2d, *Contracts,* §257, at 654-656 (1964 ed.); 3 *Corbin on Contracts,* §51, at 197 (1960 ed.); *Williston on Contracts,* §615, at 1767 (1936 ed.); 4 *Williston on Contracts,* §615, at 597 (3d ed. 1961). Thus, as the Ninth Circuit declared in *United States* v. *McKinnon,* 289 F.2d 908, 909 (C.A. 9, 1961), concerning a claim for extra work by a government contractor, "one just must take his government contracts subject to applicable statutes."

It must not be forgotten that we have even more in the case at bar; we have express contract references to the Act. Specific reference was, indeed, made in the subject government contract to the Davis-Bacon Act. Those contract provisions were, *first,* a statement that such construction work should be done by subcontracts which would contain Davis-Bacon Act stipulations, rather than by the contractor's own employees, and *second,* a letter dated concurrently with the date of the contract stating that if the contractor does perform Davis-Bacon work with its own employees, the contract will be modified to incorporate the Davis-Bacon Act stipulations. Again, because of the limited scope of discovery permitted thus far, it may be later found that further provisions and agreements exist. In any event, the law is clear that a reference in a contract to a statute renders that statute a part of the agreement. Further, it is clear that in construing a contract which rests upon a statute, the statute must be read into the contract, with the construction intended by the legislature. *Maryland-National Capital Park Commission* v. *Lynn,* 514 F.2d 829, 833 (C.A. D.C. 1975); *Personal Industrial Bankers, Inc.* v. *Citizens Budget Co.,* 80 F.2d 327, 328 (C.C.A. 6, 1935).

2. Petitioner's acts imply assumption of Davis-Bacon obligations. It is asserted in this cause by respondent and the respondent class that they, as employees of the petitioner, were assigned and did perform work constituting construction work within the meaning of the Davis-Bacon Act. At this point in the proceedings, and for purposes of the summary judgment now on appeal which was granted on other grounds, this assertion must be taken as true. It is clear, then, that to the extent the petitioner's employees were performing Davis-Bacon Act construction work so assigned to them, the petitioner is and has placed

itself in the position of a subcontractor under its prime contract. Article XXXIII ("Labor Provisions") of the contract prescribes that such work is to be done by subcontract which shall "contain the provisions relative to labor and wages" required by Davis-Bacon. In the capacity of a subcontractor performing construction work on the project, well knowing of the contract requirement that all such subcontractors are obligated to pay the statutory wages, petitioner must be deemed by implication to have undertaken those same obligations.[13]

It is not unusual for a general contractor also to act as a subcontractor on the job. Indeed, in *Bushman Construction Co.* v. *Conner,* 260 F.Supp. 779 (D.Colo., 1966), it is noted that "The prime contractor did only the cement and carpentry work. All of the other construction was subcontracted" (260 F.Supp. at 782). And anyone familiar with construction activities is familiar with the practice of the general contractor "acting as his own carpentry (or cement, or electrical, or plumbing, or painting) subcontractor."

That which is implied in a contract situation is as effectual as what is expressed. *Bulkley* v. *United States,* 86 U.S. 37, 40 (1874) (saying, in addition, that "Human affairs are largely conducted upon the principle of implications"; *Board of Supervisors* v. *Lackawanna Iron*

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[13] Indeed, petitioner in its capacity as prime contractor has entered into a number of construction subcontracts, all including the Davis-Bacon Act required stipulations and the standard contract clauses promulgated by procurement regulations and included within printed forms used with those subcontracts. Copies of certain of those subcontracts have been obtained by the respondent class, again through Freedom of Information Act procedures. 5 U.S.C. §552 *et seq.*

& Coal Co., 93 U.S. 619, 624, 23 L.Ed. 989, 991 (1877); *Perry* v. *Sindermann,* 408 U.S. 593, 599-602, 92 S.Ct. 2694, 2699-2700 (1972) (affirming reversal of a summary judgment in a teacher's action claiming the existence of a "*de facto* tenure program" for "absence of such an explicit contractual provision may not always foreclose the possibility"). Where a well-established practice or custom exists (such as that pursuant to which general contractors often undertake subcontractor functions as to certain crafts), it is assumed that the parties to the contract intend that practice or custom to apply, absent express language in the contract to the contrary. *Everett Plywood Corp.* v. *United States,* 512 F.2d 1082, 1089 (Ct.Cl. 1975) (also holding that "regulations in effect at the time of a contract are a useful guide in the resolution of a contract case"). Indeed, the rules with respect to the creation of implied contracts apply in government contract situations, and "A contract may be implied where all the formalities in connection with the execution of a contract have not been complied with" (91 C.J.S., *United States,* §89, at 170 (1955 ed.)).

Assuming then, *arguendo,* that by reason of the government contract in the case at bar our petitioner-contractor is not bound by the Davis-Bacon Act in its capacity as *prime contractor,* it is nonetheless bound as a *subcontractor* who, without question, is expressly authorized by that contract to perform Davis-Bacon Act work and likewise obligated to pay the statutory wage.

3. The Davis-Bacon Act Congressionally-mandated effects on the procurement process. No one can deny that the procurement process would be easier and cheaper for the government and for certain government contractors, had Congress not enacted the Davis-Bacon Act (40

U.S.C. §276a *et seq.*), the Walsh-Healey Public Contracts Act (41 U.S.C. §35 *et seq.*) and the McNamara-O'Hara Service Contract Act (41 U.S.C. §351 *et seq.*). Yet these statutes represent important policy decisions which have been consistently reaffirmed by Congress, nothwithstanding their impact on the procurement process. Thus, the Attorney General of the United States, in an opinion issued on March 9, 1979, in response to a request of the President (see 1979 Labor Law Reports (C.C.H.), ¶31,253 (4-13-79)), has noted:

> "Congress considered the contract labor standards statutes to be among the 'ancillary' statutes which affect procurement [citing at fn 32: S.Rept. 91-427, 91st Cong., 1st Sess., at 6, 13-14; H.R.Report 91-468, 91st Cong., 1st Sess., at 151.]. * * *
>
> "[These are] statutory socio-economic programs implemented through the procurement process * * * [which the 1969 Commission on Government Procurement] viewed * * * as extraneous burdens on the procurement system [noting at fn. 49: See CGP Report, vol. 1, at 111-18. The report refers to the Labor Department's wage-hour regulations as 'collateral' ones that 'affect' procurement. Id. at 33.] * * *
>
> "As the Commission report points out, these programs serve a broad variety of interests: labor, environment, small business, anti-discrimination, protection of domestic industry, and others. * * * The contract wage-hour statutes in particular are the result of a strong legislative concern that the government's general interest in efficient, economical procurement will not be satisfied at the expense of contractors' employees. [noting at fn. 52: See H.R. Rept. 1162, 74th Cong., 2d Sess., at 2 (Davis-Bacon Act); S.Rept. 1157, 74th Cong., 1st Sess., at 4 (Walsh-Healey Act); H.R.Rept. 948, 89th Cong., 1st Sess., at 3 (Service Contracting Act).]."

The effects of the legislative policies represented by the Davis-Bacon Act and thus described, are effects which the government procurement agencies and government contractors must accept, and to which the courts must defer. Our petitioner has, of course, any number of contractual, administrative, judicial and statutory remedies in proceedings involving the government, for any uncertainties, inequities and improprieties petitioner has sustained or may hereafter suffer by reason of its contract.[14]

II.

THE SUPREME COURT WILL CONSIDER ONLY THE "QUESTION PRESENTED" BY THE PETITIONER AND THOSE QUESTIONS FAIRLY COMPRISED THEREIN. THE QUESTION PRESENTED BY PETITIONER CONCERNS CONTRACT INTERPRETATION AND THE IMPACT OF THE DAVIS-BACON ACT ON THE INTERPRETATION OF ITS GOVERNMENT CONTRACT. ARGUMENTS BY PETITIONER TO THE EFFECT THAT RESPONDENT HAS NO RIGHT OF ACTION UNDER OR BY REASON OF THE ACT, AND THAT RESPONDENT HAS FAILED TO EXHAUST ADMINISTRATIVE REMEDIES, ARE NOT SO FAIRLY COMPRISED AND HAVE ALREADY BEEN RECENTLY CONSIDERED BY THIS COURT TWICE IN RELATED LITIGATION.

Respondent and the respondent class respectfully submit that the question presented by petitioner in his with-

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[14] See, for example: (a) Contract Disputes Act of 1978, 41 U.S.C. §§601-613, P.L. 95-563, (b) Wunderlich Act, 41 U.S.C. §§321-322, (c) 42 U.S.C. §7194(a)(b), providing for Department of Energy adjustments to rules, regulations and orders to prevent special hardship, inequity or unfair distribution of burdens, (d) Disputes Clause, AEC/ERDA/DOE regulations, 41 C.F.R. §9-7.802-5, (e) Equitable Adjustments Clause, AEC/ERDA/DOE regulations, 41 C.F.R. §9-1.5004-2.

in Petition, does not fairly comprise certain arguments which petitioner attempts at various points in the Petition. In addition, it is clear that the petitioner is in this round-about and indirect manner, seeking to renew recently unsuccessful attempts in a related case[15] to prevail on those same arguments. Indeed, those recent attempts have been terminated only last year, in 1978, with the denial of the second petition for certiorari in that case.

These arguments may be characterized, briefly but accurately, as the following: (a) that respondent and his class have no implied right of action under or by reason of the Davis-Bacon Act, and (b) that respondent and his class have failed to exhaust administrative remedies. The conclusion that these arguments are but repetitions of identical claims so recently rejected, is not just that of this respondent. The Seventh Circuit, in its opinion in the instant case supporting its decision to reverse the summary judgment allowed in the district court, remarked, *inter alia* (see *Coutu* v. *Universities Research Association, Inc.*, 595 F.2d 396, 397 (C.A. 7, 1979), and Appendix A at A2):

> "We held in *McDaniel* v. *University of Chicago*, 512 F.2d 583 (7th Cir. 1975), reaffirmed on remand, 548 F.2d 689 (7th Cir. 1977), certiorari denied, 434 U.S.

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[15] *McDaniel* v. *University of Chicago*, 512 F.2d 583 (C.A. 7, 1975), vacated and remanded "for further consideration in light of *SIPC* v. *Barbour*, 421 U.S. 412, 95 S.Ct. 1733, 44 L.Ed.2d 263 (1975) and *Cort* v. *Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975)", 423 U.S. 809, 96 S.Ct. 20, 46 L.Ed.2d 30 (1975), reaffirmed on remand, 548 F.2d 689 (C.A. 7, 1977), certiorari denied, 434 U.S. 1033, 98 S.Ct. 765, 54 L.Ed.2d 780 (1978). Counsel are the same in both the instant *Coutu* and the *McDaniel* cases.

> 1033, 98 S.Ct. 765, 54 L.Ed.2d 780, that employees have an implied private right of action to sue for wages due under the Act. Our decision in the present case flows directly from the *McDaniel* opinions. The complications arise only from the procedural posture of the case and from defendant's renewed attempts to establish an exhaustion requirement."

The "Question Presented" in the Petition to which this brief in opposition responds, reads in full as follows (petition, at 2):

> "Whether the Court of Appeals, reversing the District Court, erroneously construed the Davis-Bacon Act by holding that the District Court had jurisdiction thereunder to alter in favor of a third party substantive terms of a federal contract which was valid as between the contracting parties."

That question concerns, and may be deemed to comprise subsidiary questions dealing with, contract interpretation and the impact of the Davis-Bacon Act on the interpretation of petitioner's government contract. It certainly does not comprise or suggest, even remotely, arguments concerning the existence of an implied right of action or the existence of an exhaustion requirement.

Respondent, individually and on behalf of the respondent class, is prepared again to brief these arguments; and respondent will continue to be prepared to brief them as long and as many times as petitioner and its counsel and the nature of the issues demand. But a respondent should not be required to do so when the arguments are but repetitions of identical claims so recently made and rejected, when they are not reasonably subsumed under a question actually presented by a petitioner seeking review on writ of certiorari, and when this Court has di-

rected that "Only the questions set forth in the petition or fairly comprised therein will be considered by the court" (see Supreme Court Rule 23-1(c)).[16]

CONCLUSION

There are no special and important reasons for this Court to grant certiorari in this cause. The Seventh Circuit has not rendered a decision in conflict with decisions of this Court or of other courts of appeals; nor has it decided an important question of federal law which has not been, but should be, settled by this Court; nor has it so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision; nor are there other reasons why the Court should grant the discretionary writ.

The Seventh Circuit was manifestly correct when it ruled that summary judgment should not have been granted against the respondent and the respondent class, that the judgment dismissing the complaint be reversed, and that the cause be remanded to the district court for further proceedings.

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[16] Respondent submits, in addition, that the fact that these arguments have been so recently and so authoritatively rejected—by the Court of Appeals for substance and by the United States Supreme Court for review on certiorari—forms additional support for respondent's position that there are no special and important reasons for the grant of certiorari in this case.

Respondent, individually and on behalf of his class, requests that this Court deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

HUGH B. ARNOLD
DANIEL N. KADJAN
ARNOLD AND KADJAN
11 South LaSalle Street
Chicago, Illinois 60603

ROBERT JAY NYE
NYE AND NYE
420 North Euclid Avenue
Oak Park, Illinois 60302

Attorneys for Respondent Stanley E. Coutu, and the Respondent Class.

October 10, 1979

No. 78-1945

In the Supreme Court of the United States

OCTOBER TERM, 1979

UNIVERSITIES RESEARCH ASSOCIATION, INC.,
PETITIONER

v.

STANLEY E. COUTU

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. MCCREE, JR.
Solicitor General

ALICE DANIEL
Assistant Attorney General

HARRIET S. SHAPIRO
Assistant to the Solicitor General

ROBERT E. KOPP
ELOISE E. DAVIES
Attorneys
Department of Justice
Washington, D.C. 20530

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed pursuant to the Court's invitation to the Solicitor General to express the views of the United States.

QUESTION PRESENTED

The United States will discuss the question whether a laborer who has performed services for a private employer in connection with a government contract that does not specify payment of prevailing wages as

determined by the Secretary of Labor under the Davis-Bacon Act is entitled to bring an action for damages against the employer based upon allegations that the employer has violated the Act by paying less than the prevailing wages the Act requires.

STATUTES INVOLVED

The Davis-Bacon Act, 40 U.S.C. 276a(a), is set forth at Pet. App. D.

Section 2 of the Miller Act, 40 U.S.C. 270b, provides:

> (a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under sections 270a to 270d of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed

the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelop addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by him. The United States shall not be liable for the payment of any costs or expenses of any such suit.

STATEMENT

1. The Davis-Bacon Act, 40 U.S.C. 276a *et seq.*, requires that all federal contracts in excess of $2,000 for "construction, alteration, and/or repair * * * of public buildings or public works" contain a provision obligating the contractor to pay laborers and mechanics employed thereon not less than the wages

prevailing in the locality, as determined by the Secretary of Labor (40 U.S.C. 276a).[1] The contracting officer is authorized to withhold from the contractor a sum sufficient to reimburse the laborers and mechanics for any difference between the wages they actually receive and the locally prevailing wages as determined by the Secretary (40 U.S.C. 276a).[2] The Comptroller General uses the withheld funds to make necessary reimbursements directly to the covered employees (40 U.S.C. 276a-2(a)).

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[1] If the contracting agency (here, the former United States Atomic Energy Commission, now the Department of Energy) determines that a proposed contract is subject to the Davis-Bacon Act, a wage determination is requested from the Wage and Hour Division of the Department of Labor. (In areas such as Chicago, where there is significant continuing federal construction, the Department of Labor has published wage determinations in the Federal Register that are not tied to any specific contract proposals.) The wage determination is made part of the specifications contained in the request for bids and subsequently is incorporated into the contract.

Contracts governed by the Act provide that any disputes concerning the proper classification of laborers and mechanics or the applicability of the labor provisions of the contract are to be referred to the Secretary of Labor for final determination (41 C.F.R. 1-18.703-1(i)). Questions regarding the interpretation or application of the Act also are to be referred to the Secretary of Labor. There is then a right of appeal to the Wage Appeals Board. See generally Reorganization Plan No. 14 of 1950, 5 U.S.C. App., at 746; 29 C.F.R. 1.1-1.16, 5.1 *et seq.*, 7.1 *et seq.*

[2] The Act in addition provides administrative penalties for failure to pay the specified minimum wages, including termination of the contract (40 U.S.C. 276a-1) and debarment of the contractor from future contract awards for a three-year period (40 U.S.C. 276a-2).

If the funds withheld are insufficient to make reimbursements in full, laborers and mechanics have the same right of action against the contractor and his sureties as that conferred by the Miller Act, 40 U.S.C. 270a *et seq.*, upon persons furnishing labor and materials (40 U.S.C. 276a-2(b)). The Miller Act requires any person entering into a contract exceeding $25,000 for the "construction, alteration, or repair of any public building or public work of the United States" to furnish certain bonds to the United States, including a payment bond for the protection of persons supplying labor or material for use in the contract work (40 U.S.C. 270a(a)(2), as amended by Pub. L. No. 95-585, 92 Stat. 2484). Suits on these bonds may be brought by any person who has furnished labor or material in the performance of the contract and has not been paid in full within a specified time (40 U.S.C. 270b(a)).

2. Petitioner Universities Research Association, Inc., is a not-for-profit consortium of universities that operates the Fermi National Accelerator Laboratory, a government-owned research laboratory located in Kane County, Illinois, for the Department of Energy. Respondent Stanley E. Coutu is an electronic technician who was employed by the laboratory from 1972 through 1975. The long-standing contract between petitioner and the United States involved in this lawsuit was made by the Atomic Energy Commission for the design and construction of the laboratory. It was modified on April 6, 1972, to set forth the terms and conditions under which petitioner would

"continue the design and construction of the accelerator and related facilities and undertake the operation, maintenance, and use of the [laboratory]." [3] The contract contained wage provisions, but it did not contain the standard specifications for the payment of prevailing wages ordinarily found in a Davis-Bacon contract (Pet. App. A15; see 29 C.F.R. 5.5). One clause in the labor provisions section read as follows (Pet. App. A15):

> Article XXXIII—Labor Provisions.
>
> 1. This contract does not contemplate the performance of work by [petitioner], with its own employees, which the Commission [now DOE] determines is subject to the Davis-Bacon Act. Such work, if any, performed under this contract shall be procured by subcontracts which shall be subject to the written approval of the Commission * * *.

However, correspondence between petitioner and the Atomic Energy Commission, dated April 6, 1972, and seemingly incorporated into the contract, "[left] open the possibility of performing the Davis-Bacon Act work by [petitioner's] employees pursuant to proper Davis-Bacon determinations by [DOE] with regard to the work to be performed, and pursuant to appropriate modification of the contract to incorporate the necessary provisions relative to wages and labor" (*id.* at A17).

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[3] Contract No. AT(49-8)-3000, Modification No. 14, "Recitals." A copy of this contract was submitted to the district court (Pet. App. A14).

Respondent, on behalf of himself and a class of mechanics and laborers who had performed work under the contract (see Pet. App. A23), brought this action in the United States District Court for the Northern District of Illinois, seeking in excess of $5 million in damages on the ground that petitioner had paid them less than the prevailing wages required by the Davis-Bacon Act for construction work. The complaint stated seven causes of action, the first of which alleged that petitioner had violated the Davis-Bacon Act by not paying the minimum wages required by the contract and the prevailing wage determinations of the Secretary of Labor (Pet. App. A13, A15). The district court (Judge McGarr) dismissed this claim because it found that respondent's allegations were "not totally borne out by the alleged Contract" (*id.* at A15, A22, A24). Count II alleged a breach of petitioner's obligations under a contract falling within the purview of the Davis-Bacon Act (*id.* at A13, A24).[4] The remaining causes of action were based on common law counts for fraud, restitution, and contractual indebtedness, for which pendent federal jurisdiction was alleged (*id.* at A13). Relying on the Seventh Circuit's decision in *McDaniel* v. *University of Chicago*, 512 F.2d 583, vacated and remanded, 423 U.S. 810 (1975), reaff'd on remand, 548 F.2d 689 (1977), cert. denied, 434 U.S. 1033 (1978), the district court denied petitioner's motion to dismiss

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[4] Jurisdiction for this cause of action was unvoked under 28 U.S.C. 1331 and 1337 and the Davis-Bacon Act, 40 U.S.C. 267a (Pet. App. A13).

Count II and the pendent counts and granted respondent "leave to show that the Secretary of Labor through [DOE] has made Davis-Bacon Act determinations with respect to the alleged contract, and that [respondent] and the class have performed such work at [petitioner's] direction, pursuant to the contract" (Pet. App. A18).

Subsequently, petitioner moved for summary judgment and supported its motion by the affidavit of John R. Frazier, Chief Legal Counsel for the Fermi National Accelerator Laboratory, which stated that "[n]o Davis-Bacon Act * * * stipulations requiring the payment of prevailing wages have ever been made a part of or incorporated in [the] Contract" (Pet. App. A24-A25). Respondent contended that the omission of Davis-Bacon Act stipulations amounted to a violation of the Act "which should not serve to shield [petitioner] from [respondent's] implied right of action found in *McDaniel* v. *University of Chicago*" (*id.* at A25). The district court (Judge Leighton) granted summary judgment in favor of petitioner. The court observed that "no Davis-Bacon Act determinations have been made a part of this contract, requiring [petitioner] to pay [respondent] at wage rates contemplated by the Davis-Bacon Act" (*id.* at A25-A26). After an examination of the statutory and regulatory framework of the Davis-Bacon Act, the court concluded that "it would be improper * * * to declare in the first instance that this contract is now subject to the Davis-Bacon Act and to make

appropriate wage determinations for the parties" (*id.* at A27).[5]

The court of appeals reversed and remanded (Pet. App. A1-A12) on the basis of its decision in *McDaniel.* The court reasoned (*id.* at A5):

> [T]wo theories of recovery remained open to [respondent] after Judge McGarr's dismissal [of Count I]: (1) there may have been Davis-Bacon Act stipulations in the contract or (2) there may have been other evidence that the contract was one for Davis-Bacon Act work, in which case the required stipulations arguably become a part of the contract by operation of law. Judge Leighton's grant of summary judgment was based on the affidavit * * * tending to disprove only the first of these two theories. We hold that summary judgment was improperly entered against [respondent] and his class because the required wage stipulations were incorporated by operation of law.

In the court of appeals' view, "if the [petitioner] actually performed [Davis-Bacon] work with its own employees at the Fermi Laboratory, [respondent and his class] became entitled to the prevailing wages in Kane County where the work was to be performed. This conclusion follows from our holding in *McDaniel* v. *University of Chicago, supra*" (*id.* at A6). The court rejected petitioner's contention that, assuming a private right of action exists under *McDaniel,* ex-

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[5] The court dismissed the pendent counts after granting summary judgment in favor of petitioner on Count II (Pet. App. A27).

haustion of administrative remedies is a prerequisite to judicial relief (*id.* at A10). The court concluded that if on remand respondent could prove that he and his class had performed "construction, alteration or repair" work at the laboratory, they would be entitled "to recover wages that the Secretary of Labor has determined to be prevailing for the corresponding classes of laborers and mechanics employed on similar projects in Kane County, Illinois" (*id.* at A12).[6]

DISCUSSION

1. As the court of appeals acknowledged (Pet. App. A2, A6), the decision in this case follows the court's holding in *McDaniel* v. *University of Chicago*, *supra*, that "implying a private right of action in the Davis-Bacon Act is necessary to effectuate the intention of Congress in passing the statute" (548 F.2d at 695). Accordingly, the question whether there is an implied private right of action under the Davis-Bacon Act in favor of an employee who alleges he was not paid the prevailing wages required by the Act, which was twice before this Court in *McDaniel*, is raised once again in the instant petition for a writ of certiorari.[7]

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[6] The court of appeals also assumed that on remand the district court would decide the pendent claims presented in Counts III-VII of the complaint (Pet. App. A12).

[7] Respondent's contention (Br. in Opp. 26-29) that the questions presented in the petition do not fairly comprise the question of the existence of a private cause of action under the Davis-Bacon Act is incorrect. The question presented is "[w]hether the Court of Appeals * * * erroneously construed the Davis-Bacon Act by holding that the District Court had

In our amicus brief in *McDaniel*, we stated that "[b]ecause of its significance for federal procurement, the question whether the Davis-Bacon Act confers a right of action upon an employee who wishes to challenge the absence of a prevailing wage provision in his employer's contract with the government is an important question of federal law that this Court should decide in an appropriate case" (Amicus Br. 30).[8] We believe that this is an appropriate case in which to resolve the question.

The reasons for the government's recommendation that certiorari be denied in *McDaniel* are not present here.[9] This case squarely raises the question whether the Davis-Bacon Act confers a right of action upon an employee who allegedly has performed

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jurisdiction thereunder to alter in favor of a third party substantive terms of a federal contract" (Pet. 2). The question thus raises the issue of the district court's power under Davis-Bacon to alter a contract in favor of a non-contracting party, and at least by necessary implication, if not explicitly, the issue of the existence of a private cause of action under the Act.

[8] We are sending respondent a copy of the government's amicus brief in *McDaniel*.

[9] We recommended against plenary review of the court of appeals' interlocutory order in *McDaniel* because the dispute could have been resolved under contract law principles, under the facts assumed by the court of appeals, without reaching the statutory issue whether a private right of action in favor of a laborer for prevailing wages may be implied under the Davis-Bacon Act. After extensive discovery, *McDaniel* is currently pending in the district court on defendant's motion for summary judgment. The provisions of the contract involved in *McDaniel* are the same as those at issue here.

Davis-Bacon "construction, alteration and/or repair" work (40 U.S.C. 276a(a)) for less than prevailing wages under a contract that does not provide for the payment of prevailing wages. Although the complaint in this case prior to Judge McGarr's dismissal of Count I was, like McDaniel's complaint, susceptible of being read to assert two different theories of recovery, one based on the express terms of the contract and the other based on the contractor's obligations under the Act, the case as decided by the court of appeals on Count II turned unambiguously on the latter theory (see Pet. App. A7).

2. In the government's view, the Davis-Bacon Act does not confer an implied right of action against a contractor in favor of an employee for back wages under a contract that has been administratively determined not to call for Davis-Bacon work and that therefore does not include Davis-Bacon stipulations.[10] In our amicus brief in *McDaniel* (at pages 13-30), we considered this question in light of the four criteria set forth in *Cort* v. *Ash*, 422 U.S. 66, 78 (1975):

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted * * * —that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? * * *

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[10] The Court need not decide in this case whether a contractor employee would have a cause of action against the government to challenge a final agency decision not to include Davis-Bacon Act specifications in a contract.

> Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? * * * And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

We concluded that the Davis-Bacon Act was enacted for the "especial" benefit of construction workers (see *United States* v. *Binghamton Construction Co.*, 347 U.S. 171, 178 (1954)) and that a private action would not intrude the federal courts into an area that is basically the concern of the states (Amicus Br. 14-16, 28-29). Outweighing these factors, however, was the strong evidence of a legislative intent to deny a private remedy such as that recognized by the court of appeals (Amicus Br. 16-24). We pointed out that the Act includes a specific remedy on behalf of laborers—a suit on the Miller Act bond required for construction contracts (see page 5, *supra*)—and that it was therefore appropriate to presume that Congress did not intend the implication of other remedies.[11] Additionally, we noted that in amending the Act in 1964 Congress refused to consider a proposal offered by Representative

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[11] See, *e.g.*, *United States* v. *Babcock*, 250 U.S. 328, 331 (1919); *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297, 301 (1943); *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714, 720 (1967); *Brown* v. *General Services Administration*, 425 U.S. 820, 834-835 (1976). See also *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, No. 77-1645 (Nov. 13, 1979), slip op. 8.

Goodell that would have provided a private right of action by employees for unpaid wages, thus evidencing both Congress' assumption that the existing statute does not provide such a right of action and its intent to preclude that remedy. H.R. 9590, 88th Cong., 2d Sess. (1964); 110 Cong. Rec. 1194-1204, 1227-1229 (1964). Finally, we expressed the view that it would be inconsistent with the legislative scheme to allow employees to bring an action seeking back wages based on an allegedly incorrect agency coverage determination, in view of the specific statutory provisions for the benefit of employees (Amicus Br. 24-28).[12] We suggested that the rights explicitly granted in the Davis-Bacon Act represent a balance between the competing goals of protecting laborers and promoting the efficiency of the government procurement process and that alterations in the balance would be inconsistent with this scheme. In light of

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[12] The Act requires the contracting agency to include in the specifications for federal construction contracts the Secretary of Labor's determination of the prevailing wages for construction workers on similar projects in the locality involved and to incorporate into the contracts based on these specifications a stipulation that the contractor will pay at least those wages to all mechanics and laborers employed on the site (40 U.S.C. 276a). The contract must also permit the contracting officer to withhold from the amount due the contractor any amount necessary to assure that such mechanics and laborers are paid at prevailing rates (*ibid.*). If the amount withheld is insufficient, the laborers and mechanics are granted the right to sue on the payment bond required by the Miller Act (40 U.S.C. 270a) to recover the prevailing wage specified in the government contract (40 U.S.C. 276a-2(b)).

these factors, we were persuaded that "if there is a need for a private enforcement action under the Davis-Bacon Act, it should be supplied by the Congress and not by the courts" (*id.* at 30).

The conclusion we reached in *McDaniel* is substantially reinforced by the Court's recent decisions in *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979); *Touche Ross & Co.* v. *Redington*, No. 78-309 (June 18, 1979); and *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, No. 77-1645 (Nov. 13, 1979). These cases emphasize that implication of a private right of action presents a question solely of statutory construction. In *Cannon*, the Court stated that "the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person" (441 U.S. at 688). In *Touche Ross & Co.*, the Court indicated that while the four factors specified in *Cort* v. *Ash* remain "relevant," they are not entitled to equal weight—"[t]he central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action" (slip op. 15). And in *Transamerica*, the Court reiterated that "[t]he dispositive question remains whether Congress intended to create any such remedy" (slip op. 4, 12).

The Davis-Bacon Act is not susceptible to the construction that it either expressly or implicitly confers a private right of action for back wages where a government agency had determined that the Act is inapplicable. The court of appeals nevertheless implied a private cause of action on behalf of laborers

in *McDaniel* because the case demonstrated "how the governmental remedies specifically provided in the Act can be ineffective in accomplishing the congressional purpose" (548 F.2d at 694). In *Transamerica Mortgage Advisors, Inc.* v. *Lewis, supra,* the Ninth Circuit similarly reasoned that "implication of a private right of action for injunctive relief and damages in favor of appropriate plaintiffs is necessary to achieve the goals of Congress in enacting the legislation" there involved (slip op. 2). This Court, reversing in part in *Transamerica,* held that the dispositive question was not whether the Act involved "was intended to protect the victims of the fraudulent practices it prohibited" but "whether Congress intended to create any such remedy" (slip op. 12). Once it had answered that question in the negative, the Court announced that "[its] inquiry [was] at an end" (*ibid.*).

Because the Davis-Bacon Act imposes express duties upon contracting agencies and contractors for the benefit of mechanics and laborers, see pages 4-5, *supra,* including the explicit right to sue on the bond required by the Miller Act, it is most unlikely that Congress also intended to confer a private right of action that it "absentmindedly forgot to mention." *Cannon* v. *University of Chicago, supra,* 441 U.S. at 742 (Powell, J., dissenting), quoted in *Transamerica Mortgage Advisors, Inc.* v. *Lewis, supra,* slip op. 8. There is, instead, a strong implication that Congress was unwilling to impose any monetary liability upon employers to reimburse em-

ployees for work performed under a contract that does not contain an express provision requiring the payment of prevailing wages. Thus, it is inappropriate for the courts to create a private right of action that would upset the balance of the legislative scheme, even though such an action would inure to the benefit of the class of laborers and mechanics "for whose especial benefit the statute was enacted." *Cort* v. *Ash*, *supra*, 422 U.S. at 78.[13]

3. If, contrary to our view, the Davis-Bacon Act does afford employees a right of action to challenge the omission of prevailing wage stipulations from their employers' contracts with the government, we submit that the district courts should not make de novo determinations concerning whether the contract was one for "construction, alteration, or repair work" requiring the inclusion of such stipulations. Although the court of appeals remarked that the "question of who is to decide whether a contract is subject to the Act" was not before it (Pet. App. A4 n.6), the court went on to hold that the district court should determine on remand whether the Fermi Laboratory con-

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[13] This is not a case in which the Davis-Bacon Act provisions were inadvertently omitted from a contract or in which the contracting agency concedes that the omission was erroneous. Thus, respondent's arguments (Br. in Opp. 12-22) that the provisions must be deemed incorporated in the contract as a matter of law obscure the real issue here—whether, in the circumstances of this case, it is the courts or the agencies involved that have the responsibility under the Act for identifying the contracts that require inclusion of Davis-Bacon provisions.

tract required the payment of prevailing wages "as a matter of law" (*id.* at A11-A12). Plainly, the question whether petitioner's contract with the government is subject to the Davis-Bacon Act will have to be decided by the district court before it can determine whether the Act's prevailing wage stipulations should be incorporated into the contract by operation of law. Thus, the court of appeals' ruling requires the district court to decide whether the contract is covered by the Act.

The existence of published wage determinations for Kane County, Illinois, led the court of appeals to conclude that the case raised no question "on which deference to agency expertise is appropriate" (Pet. App. A11). This conclusion ignores the realities of what coverage determinations involve, particularly in the highly technical field of energy research and development administered by DOE. As we noted in our amicus brief in *McDaniel*, DOE, a principal government contracting agency,[14] has developed detailed guidelines for determining what constitutes "construction work" within the meaning of the Davis-Bacon Act. These detailed guidelines are necessary because of the complexity involved in classifying work entailing the performance of a large number of specialized tasks, which cannot readily be cate-

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[14] The Department of Energy has 51 contracts for the operation of complex research, development, and production facilities. Twelve of these contracts have involved total obligations since inception of more than $1 billion each; 19 involved obligations of between $100 million and $1 billion each.

gorized as either construction or nonconstruction work under traditional criteria,[15] and in order to afford a degree of certainty in the contracting process. These guidelines, many of which have been approved by the Department of Labor, are published in the Federal Register (see 41 C.F.R. 9-18.701, 9-18.704, and 9-18.750) and are applied by special committees at the contract site.

Permitting district courts to make these coverage determinations in actions by employees for back pay, without the benefit of a decision by the appropriate agency, would disrupt the federal procurement process by injecting uncertainty into such determinations. Courts simply lack the expertise necessary to make independent decisions in this area. Accordingly, if laborers are permitted to sue directly under the

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[15] For example, experimental work involving the circulation of liquids or gases under controlled conditions requires the use of "loops." The assembly, erection, modification and disassembly of a "loop set-up" is not construction work covered by Davis-Bacon, but the assembly and erection of a "loop facility" is covered. The regulations indicate that "[a] loop facility differs from a loop set-up in that it is of a more permanent character; usually, but not always, of greater size; normally involves the building or modification of a structure; sometimes is installed as a part of construction of the facility; and may be designed for use in a succession of experimental programs over a longer period of time." 41 C.F.R. 9-18.750-2(h)(2)(ii). Application of this guideline requires familiarity with the utilization of loops and their general characteristics, in order to determine whether the particular example at issue is "more permanent," or of "greater size," or for use over a "longer period of time" than usual.

Davis-Bacon Act to challenge the omission of prevailing wage specifications from their employers' government contracts, the courts should stay such proceedings under the doctrine of primary jurisdiction until the agencies concerned [16] have made a determination of the work-coverage questions. See *Far East Conference* v. *United States*, 342 U.S. 570, 574-575 (1952); *United States* v. *Western Pacific R.R.*, 352 U.S. 59, 63-65 (1956).[17] After the ap-

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[16] The contracting agency or the Department of Labor. Cf. 29 C.F.R. 5.12; 44 Fed. Reg. 77086, 77089 (1979) (proposed regulations); 41 C.F.R. 1-18.703-1(i).

[17] Although the doctrines of primary jurisdiction and exhaustion of administrative remedies serve cognate ends, they are distinguishable. See *United States* v. *Western Pacific R.R.*, *supra*, 352 U.S. at 63-64:

> "Exhaustion" applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. "Primary jurisdiction," on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views. *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U.S. 422, 433.

"Exhaustion" does not apply here because neither the Davis-Bacon Act nor the regulations promulgated thereunder now provide an administrative remedy in favor of an employee who has been injured by the failure to include prevailing wage provisions in a contract. However, the enforcement of respondent's claim in this case requires the resolution of matters that are within the special competence of DOE

propriate agency has made the requisite determinations, the courts may then decide whether Davis-Bacon Act wage schedules should be considered incorporated in the contract by operation of law. *Wood* v. *Lovett*, 313 U.S. 362, 370 (1941); *G. L. Christian and Associates* v. *United States*, 312 F.2d 418, 424-427, reargument denied, 320 F.2d 345, 347-351 (Ct. Cl.), cert. denied, 375 U.S. 954 (1963).[18] See 44 Fed. Reg. 77029 (1979).

4. The question whether the Davis-Bacon Act confers a private right of action for back pay upon a laborer who has performed services under a contract that does not include prevailing wage stipulations is of substantial importance to the federal procurement process. The availability of such suits threatens the orderly operation of that process. The disruption would be most dramatic, of course, if injunctive relief were sought, but it would also be pervasive even where, as here, the claim is simply for wages due for

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and the Department of Labor and that are regularly handled by them in other contexts. See, *e.g.*, 41 C.F.R. 1-18.703-1(i) (referral of classification disputes and questions concerning applicability of statutory clauses to Secretary of Labor for final determination); 29 C.F.R. 1.1-1.16, 5.1 *et seq.*, 7.1 *et seq.* (rights of appeal to Wage Appeals Board).

[18] If there are no existing published wage determinations that could be incorporated in the contract, an advisory wage determination may be requested from the Department of Labor. See *Curtiss-Wright Corp.* v. *McLucas*, 364 F.Supp. 750 (D.N.J. 1973); *Marine Engineers Beneficial Ass'n, District 2* v. *Military Sealift Command*, 86 Lab. Cas. ¶ 33,782 (D.D.C. 1979).

work already performed. For example, if the district court should conclude that respondent was entitled to be paid at the prevailing wage rate for construction workers because he was performing construction work, the contractor and the government must either reclassify similar jobs under the contract for the future or face the continued accrual of potential liability for back wages. In turn, reclassification might suggest the necessity for substantial alteration of the coverage guidelines, which would entail difficult decisions about what work is sufficiently similar to that performed by respondent to require reclassification.[19] Moreover, opening the provisions of existing contracts to judicial scrutiny for compliance with the Davis-Bacon Act would inevitably subject contractors to jurisdictional disputes between unions that represent construction workers and those that represent maintenance or other nonconstruction workers.

Federal budgeting is adversely affected by a determination, after a cost-plus contract has been let, that the higher construction wages must be paid even though such wages were not contemplated when the contract was let.[20] Fixed-price procurement also would be adversely affected by the possibility of such a determination. The possibility of post-contracting chal-

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[19] These coverage decisions themselves would be subject to review in other suits, with all the possibilities for conflicting decisions that such review implies. At best, the courts and the agency would be faced with the task of harmonizing a proliferating number of decisions dealing with infinitely varying facts.

[20] Such a determination could easily result in a substantial cost overrun in an operating contract of the size involved here. See note 14, *supra*.

lenges, with the concomitant potential for delays in performance due to court suits, injunctions, and efforts to reach administrative settlements, would significantly increase a bidder's uncertainty about what it would cost to perform the contract. This might discourage some potential bidders from competing for government contracts and might lead others to submit higher bids reflecting the possibility of increased costs.

For these reasons, we believe that plenary review of the court of appeals' decision is warranted. Although at present the Seventh Circuit stands alone in holding that the Act confers an implied private right of action, an expeditious, final resolution of the issue by this Court would prevent confusion in an area of the law in which certainty is desirable in the interest of the federal budget and the national economy.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

ALICE DANIEL
Assistant Attorney General

HARRIET S. SHAPIRO
Assistant to the Solicitor General

ROBERT E. KOPP
ELOISE E. DAVIES
Attorneys

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978.

No. 78-1945

UNIVERSITIES RESEARCH ASSOCIATION, INC.,
Petitioner,

vs.

STANLEY E. COUTU, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF PETITIONER

ROBERT E. MANN
Attorney for Petitioner, Universities Research Association, Inc.

SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON
55 East Monroe Street
Chicago, Illinois 60603
(312) 346-8000
Of Counsel

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

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BRIEF OF PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 595 F. 2d 396 and is reproduced in the Appendix at pp. 35-46. Two opinions entered by the District Court are reproduced in the Appendix at pp. 20-29 (McGarr, J., entered October 8, 1975) and at pp. 30-34 (Leighton, J., entered November 29, 1977).

JURISDICTION

The opinion of the Court of Appeals was filed on April 4, 1979; a petition for writ of certiorari was timely filed on June 30, 1979. This Court granted the writ on March 17, 1980 and has jurisdiction under 28 U. S. C. § 1254(1).

QUESTION PRESENTED

Whether Congress, through the Davis-Bacon Act, 40 U. S. C. § 276a, *et seq.*, has conferred upon the Federal Courts jurisdiction to alter the terms and conditions of a contract between an agency of the United States Government and its private contractor upon suit against the contractor by one of its employees after the work in question has been performed. Integral to the question presented is the issue—addressed by the United States in urging as *Amicus Curiae* that the Court grant the petition for writ of certiorari—whether a federal contractor employee has an implied right of action under that Act to maintain suit in federal court alleging failure to pay prevailing wage rates for work performed under a federal contract which does not specify that such rates be paid.

STATUTORY PROVISIONS INVOLVED

The Davis-Bacon Act, as amended, is set forth in the Appendix, pp. 48-53.

STATEMENT OF THE CASE

Petitioner, Universities Research Association, Inc. (hereinafter "URA"), is a not-for-profit incorporated association of North American universities organized to contract with the United States. Since 1967, URA has been party to a succession of contracts with agencies directed by Congress to foster high-energy physics research. Those contracts were made to facilitate construction, operation, maintenance and administration of the Fermi National Accelerator Laboratory—a 6800 acre site located in Kane and DuPage counties, Illinois, on which are located research laboratories and offices, support facilities and an extensive proton accelerator system—known as "Fermilab." The original contract, numbered AT (49-8)-3000, was between URA and the Atomic Energy Commission ("AEC") acting pursuant to the Atomic Energy Act of 1954, 42 U. S. C. § 2051. The authorities and responsibilities of the Atomic Energy Commission were later redelegated to the Energy Research and Development Agency ("ERDA") (see Energy Reorganization Act of 1974, 42 U. S. C. (Supp. V) 5801 *et seq.*) which assumed and reissued the contract under number EY-76-C-02-300. Recently, the Department of Energy ("DOE") has assumed ERDA's authorities and responsibilities. Since the facts giving rise to this lawsuit occurred during the existence of the AEC and ERDA, the contracting agency will be referred to herein as "AEC/ERDA." (App. 54)

In all respects pertinent to this case, the contract has remained unchanged throughout the succession of contracting agencies and will be referred to herein as "the contract."

The contract obligated URA, drawing upon the resources of its member institutions, to provide scientific and management services to AEC/ERDA in connection with the Fermilab project.

All funds required for those purposes, including funds to compensate persons employed by URA to carry out its contract responsibilities at Fermilab, have been provided by the United States through its contracting agencies, AEC/ERDA.[1] URA is a not-for-profit entity and receives no unrestricted compensation for its services; while it does receive a fixed "management fee," the fee must be applied to purposes expressly described in the contract and related to furtherance of the functions of Fermilab (*e.g.*, to sponsor symposia, pay travel expenses of visiting scientists, etc.).

Respondent, Stanley Coutu, was employed by URA at Fermilab as an electronics technician during a three-year period, September 25, 1972—September 10, 1975, pursuant to the contract. Relative to wages of electronics technicians and others employed at Fermilab by URA, the contract and Appendix B thereof lists all of the job classifications URA may employ, including several technician grades, and lists as allowable costs the wage and salary rates URA is authorized to pay for work performed in those classifications. (App. 54-59). Respondent's depositions of AEC/ERDA and URA officials revealed that URA is required under the contract to secure AEC/ERDA approval prior to adopting new classifications or making any changes in employee compensation. (Kennedy Dep. 79-83; Orr Dep. 17, 21; Carrigan Dep. 10, 50; Marofske Dep. 11, 23, 28-30.)[2]

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1. The contract terms were taken from AEC/ERDA procurement regulations codified at 41 CFR Part 9, originally promulgated by the AEC pursuant to authority granted by Congress in the Atomic Energy Act of 1954, 42 U. S. C. § 2201(p). Funds provided by the government are deposited in local bank accounts upon which URA may draw, subject to audit and restrictions of the contract.

2. Deponent Kennedy is an official of the contracting agency; deponents Orr, Carrigan and Marofske were, at times relevant, employed by URA as Business Manager, Director of Personnel Services, and Personnel Manager for Fermilab operations, respectively.

Relative to the Davis-Bacon Act, the contract provides:

> "This contract does not contemplate the performance of work by the Association [URA], with its own employees, which the Commission [AEC/ERDA] determines is subject to the Davis-Bacon Act. Such work, if any, performed under this contract shall be procured by subcontracts which shall be subject to the written approval of the Commission and contain the provisions relative to labor and wages required by law to be included in contracts for the construction, alteration, and/or repair, including painting and decorating, of a public building or public work."
>
> (As found by the lower courts, App. 22, 32, 39, 55)

In accord with the foregoing provision, physical construction of the Fermilab complex was accomplished by a joint venture of private architectural, engineering and construction firms (known collectively as "DUSAF") pursuant to a contract between the joint venture and AEC/ERDA (#AT(04-3)-603) effective July 1, 1965 and later reissued as a subcontract to the URA-AEC/ERDA contract (subcontract #68-1). Construction was commenced in 1968 and was essentially completed prior to September, 1972 (Orr Dep. p. 36).[3]

The quoted provision of the URA-AEC/ERDA contract regarding work determined by AEC/ERDA to be subject to the Davis-Bacon Act has been administered by a committee of AEC/ERDA officials (Kennedy Dep. 42, 46-48, 75; Orr Dep. 82-84). That agency maintained an office at Fermilab which, during the period relevant herein, was staffed by from 15-20 officials responsible, in part, for ensuring compliance with the Act (Kennedy Dep. 88-90).

Agency determinations as to Davis-Bacon Act coverage and classifications of work thereunder are governed by AEC/ERDA regulations (41 CFR 9-18.701, 704, 750), many of which have been approved by the U. S. Department of Labor—see

3. Appropriations for construction funds were enacted in 1967 and 1968. P. L. 90-56, 81 Stat. 124; P. L. 91-44, 83 Stat. 46.

Brief for the United States as Amicus Curiae, pp. 18-19—as the Executive agency entrusted with administration of the Act pursuant to the Reorganization Plan of 1950 (64 Stat. 1267; 5 U. S. C. Appendix). Provision is made by AEC/ERDA and Department of Labor Regulations for appeals from contracting agency decisions respecting Davis-Bacon Act coverage. 41 CFR § 7.10; 29 CFR Part 5, §§ 5.6(a) (3), (c), 5.11. *See, e.g., In Re Stanford Linear Accelerator,* 16 Wage-Hour Cases 851-57 (BNA, 1965).[4]

Mr. Coutu filed the instant action on April 9, 1975 in the form of a seven count complaint charging URA with failure to make proper wage payments (App. 3-12). As revealed on deposition, Mr. Coutu does not deny that he was employed as an electronics technician nor that he was paid at rates applicable to that classification as specified in the contract; rather, his complaint is that he should have been paid at rates then prevailing in the area for construction workers (*i.e.,* rates contemplated under that portion of the Davis-Bacon Act which refers to "wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a similar character . . .") (Coutu Dep. ff).[5] Count I poses the claim in context of the Davis Bacon Act without regard to contract commitments or limitations; Count II charges that the contract itself obligated

4. The foregoing decision and appeal process has been recognized by various courts: *North Georgia Building and Construction Trades Council* v. *U. S. Department of Transportation,* 399 F. Supp. 58 (N. D. Ga. 1973); *Framlau Corp.* v. *Dembling,* 360 F. Supp. 806 (E. D. Pa. 1973); *International Union of Operating Engineers,* 355 F. Supp. 7 (W. D. Okla. 1972), *aff'd,* 480 F. 2d 603 (10th Cir. 1973).

5. From the Coutu deposition, it appears that the electronics technician job principally involved monitoring of computers, providing assistance to scientists, supervising accelerator operation and other such work which can hardly be described as "construction"; he contends that he also, from time to time, performed other tasks which he felt constituted "construction" work. (Coutu Dep. ff). If the case were to be heard, therefore, a lengthy inquiry into each day's work activity would be required.

URA to pay the wages claimed; the remaining counts are based on common law theories.

On October 8, 1975, the District Court dismissed Count I of the Complaint, noting the contract wage provisions, the absence in the contract of any Davis-Bacon Act prevailing wage stipulation, and the contract provision quoted above (App. 25, 28-29). The Court explained its decision by stating:

> "The defendant in its memorandum has soundly argued the position that the administrative determinations of the contracting agency are subject only to review by the Secretary of Labor . . . and in certain instances are appealable to the Wage Appeals Board of the U. S. Department of Labor. . . ."
>
> (App. 22)[6]

The Court described the posture of the case after dismissing Count I, as follows:

> "[T]he Court is apprised of a correspondence between [URA] and [AEC/ERDA] dated April 6, 1972, which has seemingly been incorporated into the alleged contract. This correspondence leaves open the possibility of performing Davis-Bacon Act work by defendant's employees pursuant to proper Davis-Bacon Act determinations by ERDA with regard to the work performed, and pursuant to appropriate modification of the contract. . . .
>
> "The Court is thus presented with factual considerations as to the existence of Davis-Bacon Act determinations by ERDA. . . .
>
> "This Court does not seek to review the determinations of the Secretary of Labor or of the contracting agency; rather, the Court gives plaintiff leave to show that the Secretary of

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6. The District Court later characterized the dismissed Count I as follows:

> "In Count I, plaintiff class purported to state a claim on the theory that defendant failed to compensate plaintiff class in accordance with the prevailing rate determinations made by the Secretary of Labor pursuant to the authorization of the Davis-Bacon Act, whether or not the wage determinations were incorporated in the contract. This count was dismissed. . . ." (App. 30-31).

> Labor through ERDA has made Davis-Bacon Act determinations with respect to the alleged contract, and that plaintiff and the class have performed such work at defendant's direction, pursuant to the contract."
>
> (App. 24-25)

The District Court thus ruled that the plaintiff would be entitled to relief only if he could show, under Count II of his complaint, that AEC/ERDA had issued determinations that work to be performed by the Plaintiff was subject to the Act; the Court held that it did not have jurisdiction to make such determinations or otherwise interfere with the agencies' decisions.

After Count I was dismissed, URA answered Count II and the remaining counts of the complaint (App. 13-19) denying, *inter alia,* that AEC/ERDA had made any determination that the work performed by Mr. Coutu under the contract was to be considered subject to the Davis-Bacon Act. Following a number of depositions and after making inquiry via the Freedom of Information Act, Respondent Coutu—as later noted by the District Court—was forced to concede that he could not show that AEC/ERDA had determined that his work was subject to the Davis-Bacon Act nor that the contract included any Davis-Bacon Act specifications (App. 32). Thereupon, on URA's motion for summary judgment accompanied by the affidavit of its chief legal officer that no Davis-Bacon Act determinations have been made part of the contract (App. 31-32, 37-38), the District Court dismissed the complaint in its entirety, holding (App. 32-33):

> "On the present state of the record it is clear that no Davis-Bacon Act determinations have been made a part of this contract, requiring defendant to pay plaintiff class at wage rates contemplated by the Davis-Bacon Act. The only issue is whether plaintiff class can proceed in this action under the Davis-Bacon Act absent any showing that the government and defendant have made a determination that the contract is subject to the Act's provisions. An examination of the contract, the Act, and the relevant

> regulations reveals that defendant's motion for summary judgment must be granted. There is no issue of material fact and defendant is entitled to judgment on Count II as a matter of law."

The Court continued, by noting:

> ". . . The determination of whether a contract is subject to the Act is made by the agency which is contracting on behalf of the United States government and the decision must be made in accordance with applicable regulations. 41 C. F. R. § 1-18.701-1, 1-18.701-2, 9-18.700(b). The contracting agency in this case has formal guidelines and a Davis-Bacon Committee for determining what work is subject to the Act. [Kennedy Dep. 42, 46-48, 75]. Any dispute regarding the application of the Act is referable to the Secretary of Labor for an authoritative ruling. 29 C. F. R. 5.12. The efficacy of the Act hinges on minimum wage determinations by the Secretary of Labor and the incorporation of minimum wage specifications in the contract. [citations omitted]
>
> "After examination of the statutory and regulatory framework, it becomes clear that it would be improper for this court to declare in the first instance that this contract is now subject to the Davis-Bacon Act and to make appropriate wage determinations for the parties."
>
> (App. 33-34)

The Court of Appeals for the Seventh Circuit reversed. It held that neither the absence of any AEC/ERDA determinations relative to Respondent's work, nor the absence of Davis-Bacon Act specifications in the contract, nor the post-contracting posture of the case barred the lawsuit. It held further that if the District Court were to determine that Respondent and his class had performed "construction, alteration or repair work" at Fermilab they would be entitled to compensation based on prevailing rates (App. 45-46). The Court did not describe any standard by which the District Court is to evaluate Respondent's work to determine whether it was "construction, alteration or repair," or whether the Respondent in fact worked as a

"mechanic" or "laborer," within the meaning of the Act; the Court's opinion equivocates on that point. Thus, although both District Court opinions are premised on the understanding that the Court had no jurisdiction to make a coverage determination for the parties and/or to amend the contract based on such determination, the Court of Appeals first held—after implying agreement with the premise—that the issue was not before it (App. 38 at footnote 6). Then, however, the Court proceeded to direct the District Court to grant relief if the District Court were to find that plaintiff had performed "construction" work. (App. 45-46).

Obviously, however, a coverage determination is the critical element in the case. Without a coverage determination, one cannot determine whether Respondent is entitled to any relief at all, much less what, if any, particular "prevailing rate" classification would be appropriate to his work (noting that even by Respondent's estimation, a substantial portion of his job was computer-monitoring and similar work not even remotely covered by typical Department of Labor prevailing rate determinations—cf. 42 F. R. 30108-30111, cited by the Court of Appeals as an example thereof). The Court of Appeals' equivocation as to how, or by whom, a determination must be made whether Plaintiff's work was subject to the Act, or how such work should be classified, flaws the entire opinion.

Similarly, and although the Court remanded the case to the District Court with instructions to award damages in the event it found that URA had used Respondent to perform "construction" work (App. 45-46), it elsewhere noted that: "it is not clear that such a contractor [URA-a not for profit entity] can or should be required to make restitution out of its own unrelated funds." (App. 43-44 at footnote 11). The Court also dismissed the idea that Respondent at least ought to have first raised his complaint with the contracting agency, or the Department of Labor, prior to filing suit, by noting there was no

controversy between URA and AEC/ERDA that the work was not covered by the Act (App. 43-44 at footnote 13).

The Court concluded that under its prior decisions in *McDaniel* v. *University of Chicago*, 512 F. 2d 583 (7th Cir. 1975), *vacated and remanded* 423 U. S. 810 (1975), *reaffirmed on remand*, 548 F. 2d 689 (1977) *cert. den.* 434 U. S. 1033 (1978), the Act conferred on the District Court's jurisdiction to entertain an employee's suit for recovery of "prevailing wages" regardless whether or not the agency or Department of Labor had determined that the Act applied and despite the absence of any express contract to pay such wages. It held that the obligation was part of the contract as a matter of law. (App. 39)

SUMMARY OF ARGUMENT

The Davis-Bacon Act does not operate to require payment of wages at "prevailing rates" for work performed under a government contract in the absence of a positive determination that such work is covered by the Act. The Act requires that such coverage determination must be made *prior to contracting*. The determination must be then incorporated into the contract, along with job classification and wage rate schedules determined to be applicable, and provisions for enforcement. Responsibilities for making the coverage, classification and rate determinations upon which the Act operates and is conditioned have been vested by Congress and delegated by the Department of Labor, via authorized regulation, in and to the contracting agencies; determinations made by the agencies are subject to review only by the Department of Labor and Comptroller General.

The effect of the Court of Appeals' decision will be to permit the District Court, in a private action, to make *de novo*, and *post-contracting* coverage, classification and rate determinations for the contracting agency and to enforce such determinations retrospectively upon a contractor whose contract affirmatively recites that work performed under it is not subject to the Act. Yet, the Act, its legislative history, and all previous judicial and administrative interpretations of the Act show that Congress did not intend to vest the federal Courts with jurisdiction even to *review* the agency and Department of Labor determinations upon which the Act is premised, much less jurisdiction to render such determinations *de novo* after work has been completed. The scheme of the Act and its legislative history show that Congress did not intend that it would be enforced through private rights of action.

The Court of Appeals decision ignores the literal terms of the Act, ignores all other indicia of Congressional intent, overrules a forty-year long history of administrative application, and is contrary to rulings of this Court and all other judicial opinion. If not reversed, the Court of Appeals' decision will seriously destabilize government contracting.

ARGUMENT

I.

THE FEDERAL COURTS DO NOT HAVE JURISDICTION TO MAKE COVERAGE, CLASSIFICATION, OR WAGE RATE DETERMINATIONS UNDER THE ACT

The Court of Appeals' opinion concludes with the proposition that if the Respondent by discovery or other means can determine that he performed construction, alteration or repair work at Fermilab, he may claim wage payments at "prevailing rates." (App. 45-46). A necessary consequence of the Court of Appeals' holding is to require the District Court to decide, without regard to the position of the contracting agency and contrary to the terms of an express contract: what work was, or was not, "construction, alteration and/or repair" work within the meaning of the Act; whether Respondent performed such work as a "mechanic" or as a "laborer"; which grade or classification Respondent worked within; and which "prevailing rate" was applicable to his work, if any. Such questions are especially complex in this case because this Respondent was employed by URA as an electronics technician charged with monitoring computers, assisting scientists and engineers in setting up and conducting experiments in high energy physics and supervising accelerator operation. As pointed out by the Solicitor General in the Brief for United States as *Amicus,* highly sophisticated judgments must be made in order to distinguish construction work from non-covered scientific research, experimental, and technical work. Brief for U. S., pp. 18-19 at footnote 15.

The core question, then, is whether or not the Act confers jurisdiction upon the Federal Courts independent of any AEC/ERDA or Department of Labor prior determinations, to deter-

mine *de novo* and post-contracting that such work is covered by the Davis-Bacon Act or to establish a classification rate for such work. We submit, respectfully, that the Act does not confer such jurisdiction.

A. The Legislative History of the Act Belies the Jurisdiction Recognized by the Court of Appeals

The original Davis-Bacon Act, enacted by Congress in 1931, provided unequivocably that the wages paid on certain federal construction projects "shall not be less than the prevailing rate of wages."[7] It contained only limited provisions relating to coverage, classification, or wage determinations, and provided no enforcement procedures. In 1932, Congress passed an amendment to provide for the imposition of fines and deductions on any contractor violating the Act;[8] the amendment was vetoed.[9]

Subsequently, in 1935, Congress enacted another amendment to the Act which introduced the concepts of *administrative predetermination* of coverage and rates and a prescribed enforcement scheme.[10] Thus amended, the Act provided that bidders on government contracts were to be advised in advance of the minimum wage provisions upon which their bids were to be based; further, the amended Act provided a detailed enforcement plan permitting the government to cancel contracts for noncompliance with the Act,[11] a new Section 3(a), authorizing the Comptroller General to withhold payments to contractors,[12] and a new Section 3(b), granting laborers and mechanics a

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7. Davis-Bacon Act of 1931, Chap. 411, § 1, 46 Stat. 1494.
8. S. 3847, 71st Cong. (1932).
9. See Veto Message (S. Doc. No. 134) (1932).
10. 40 U. S. C. §§ 276a-276a-2(b).
11. 40 U. S. C. § 276a-1.
12. 40 U. S. C. § 276a-2(a).

limited right to recover wages against the Miller Act bond.[13] Congress has not changed these provisions of the Davis Bacon Act since they were adopted.

Congress has, however, *considered and rejected* proposed legislation which, if enacted, would have lent support to the Court of Appeals' decision. In 1962 and 1963, the House Special Subcommittee on Labor held extensive hearings on various proposed amendments to the Davis-Bacon Act.[14] Among the legislative measures considered by the Subcommittee were two bills sponsored by Congressman Charles E. Goodell of New York. Those measures, if enacted, would have amended the Davis-Bacon Act to provide extensive judicial review of administrative determinations rendered thereunder and would have provided a private right of action in federal court to enforce the Act.[15]

Relevant provisions of H. R. 9590, proposed by Congressman Goodell, debated by Congress, were as follows:

> Sec. 7. (a) *Whenever it is claimed that any contractor or subcontractor has refused or failed to pay the wages that he is required to pay by reason of a wage determination issued* by the Secretary of Labor [under the Davis-Bacon Act] to employees . . . the contracting agency shall investigate the claim . . . and . . . shall either deny or sustain such claim.
>
> * * *
>
> "(c) *Any employee aggrieved or adversely affected by any ruling made pursuant to subsection (a) of this section may bring an action in the United States district Court* . . . against the contractor . . . to recover the amount of unpaid wages due under this Act. . . .
>
> "(d) In any action brought pursuant to subsection (b) or (c) of this section, the court shall have authority to

13. 40 U. S. C. § 276a-2(b).

14. Hearings before the Special Subcommittee on Labor of the House Committee on Education and Labor, 87th Cong., 2d Sess. (1962).

15. H. R. 11115, 87th Cong., 2d Sess. (1962), and an amended version, H. R. 9590, 88th Cong., 2d Sess. (1963).

> determine the obligations of the contractor or subcontractor under the wage provisions of his contract, and whether or not the contractor or subcontractor has failed to comply with them. . . ." (Emphasis added.)[16]

Additionally, H. R. 9590 would have further amended the Act by adding a new Section 8 to provide for judicial review of wage determinations as follows:

> "Sec. 8. (a) Any person aggrieved by a wage determination for laborers or mechanics issued pursuant to this Act . . . may obtain judicial review of such determination in an action against the Secretary of Labor and the contracting agency in a district court of the United States.
>
> * * *
>
> "(c) At the conclusion of any hearing on the merits, the court shall, in any case in which it finds that the prevailing wage originally promulgated was not determined in accordance with law, establish such prevailing wage as it deems to be in accordance wth law."[17]

If the plain language of these proposed amendments is not sufficiently clear to show that Congress has been presented with proposals to provide for judicial intervention in the administration of the Act, Congressman Goodell's explanation of its intended purpose should leave no doubt:

> "The judicial review section which I am offering permits an aggrieved individual who feels that the determination of the Secretary of Labor is erroneous to bring an action in federal court. . . ."[18]

The proposed amendments were rejected by the Committee and later by Congress following extensive debate. Thus, at the conclusion of hearings on the proposals for judicial review, the

16. H. R. 9590, 99th Cong., 2d Sess., §§ 7(a), (c) and (d) (1964).

17. H. R. 9590, 88th Cong., 2d Sess., §§ 8(a) and (c) (1964).

18. 88 Cong. Rec. 1227 (1964) (remarks by Congressman Goodell).

Committee Chairman issued a Majority Report rejecting the concept of judicial review as embodied in the Goodell bill.[19] In recommending that the House reject amendments adding judicial review to the Act, the Majority Report stated:

> "[J]udicial review of wage determinations under the Davis-Bacon Act is *simply not practicable* and, in fact, could *frustrate the entire program.*" (Emphasis added.)[20]

The Majority Report went on to note that some form of review of wage determinations should be provided; it concluded, however, that "administrative improvements rather than a legislative solution provide the best approach."[21] The Majority Report then observed that the Secretary of Labor had recently established a Wage Appeals Board having jurisdiction over "all significant questions under these labor standard statutes" and concluded:

> "The Committee is confident that this Board offers the necessary procedural protections for interested parties, *without impeding the operation of our construction programs.*[22]
>
> * * * * *
>
> "In enforcement cases, the Board is empowered to review potential debarment cases on the record after full opportunity to be heard has been extended to any contractor or subcontract. The committee believes that the effectiveness and adequacy of this administrative approach should be thoroughly tested before consideration is given to other measures." (Emphasis added.)[23]

The Report makes clear the fact that the majority of the Committee, whose views were ultimately ratified by the House, considered provision for judicial review inimical to the various

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19. H. R. Rep. No. 308, 88th Cong., 1st Sess. (1964).
20. H. R. Rep. No. 308, 88th Cong., 1st Sess., p. 4 (1964).
21. *Ibid.*
22. *Ibid.*
23. H. R. Rep. No. 308, 88th Cong., 1st Sess., p. 5 (1964).

interests promoted under the Act and urged rejection of the concept. Furthermore, it is equally clear from the acrimonious comments contained in the majority views, in which Congressman Goodell joined, that no provision of the Davis-Bacon Act then (or now) provided the District Courts with jurisdiction to make Davis-Bacon Act determinations; *e.g.*:

> "At the present time, every finding of the Secretary of Labor, with or without an investigation and with or without a hearing, is final. Neither employees or employers have any recourse except to beg the Secretary for mercy, or perhaps prevail upon their Congressman to intervene. It is an intolerable situation for such arbitrary and final authority to be lodged in a single administrator."[24]

When the amendments were reported out of committee and debated on the House floor, Congressman Goodell and his colleagues once again attempted to confer on affected parties broad recourse to the courts via the above-quoted proposed amendment to the Act. The debate on the House floor and ensuing defeat of Congressman Goodell's proposed amendments[26] reveals that Congress intended to provide no such recourse. Reflecting views of the majority, Congressman Fogarty argued as follows:

> "What will the Goodell amendment do? This is what it will do. It will allow any contractor or subcontractor, bidder or prospective bidder, employee or prospective employee and so far as the bill is concerned, almost anyone who regards himself adversely affected by the Secretary's wage determinations to go into court and stop that project cold. . . .
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> "This phrase 'judicial review' is an appealing concept, but it is not practical. Its purpose is to try to drive a wedge into the effective operation of the Davis-Bacon Act which has been in existence for the past 30-some years."[27]

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24. H. R. Rep. No. 308, 88th Cong., 1st Sess., p. 29 (1964).
26. 88 Cong. Rec. 1201-1231 (1964).
27. 88 Cong. Rec. 1201.

The Goodell bill thus was defeated. Congress viewed the administrative procedures then available as entirely adequate. Congress has spoken no differently in this regard since 1964. The intent of Congress could hardly be more clear. The Act does not contain provisions for judicial determination and attempts to amend it in that respect have been defeated. Since the Court of Appeals' reversal of the District Court necessarily would compel the District Court to decide whether work is or is not covered by the Act, what "prevailing rate" classifications are or are not applicable, and, in general, to assume all of the Labor Department and contracting agency's responsibilities in such matters, it is clear that the Court's decision is contrary to the intent of Congress as revealed by the record of its deliberations. As the District Court properly recognized, the District Courts plainly have not been given jurisdiction to decide such matters. Regardless whether or not the District Courts have jurisdiction to enforce express contract specifications freely accepted by the defending party and based on an administrative pre-determination incorporated into the contract, the District Courts plainly do not have jurisdiction to alter existing federal contracts based on the Courts' own perceptions of the Act's requirements.

B. The Court of Appeals' Decision to Allow District Courts to Make Coverage, Classification and Wage Rate Determinations Departs from All Prior Judicial Opinion

The Davis-Bacon Act is one of three statutes regulating the labor provisions of federal contracts.[28] Each of these statutes vests the Secretary of Labor with definitive authority to construe and apply its terms and to determine coverage.[29] In accord with the obvious legislative intent to vest within the Executive agencies exclusive authority to supervise the labor standards of

28. *See also,* 41 U. S. C. § 35 *et seq.* (the Walsh-Healy Act) and 41 U. S. C. § 351 *et seq.* (the Service Contract Act).

29. *See* 40 U. S. C. § 276c; 41 U. S. C. § 38; 41 U. S. C. § 353a.

federal contracts—via such delegations of authority to the other agencies Labor Secretary may make—the Courts have repeatedly, unequivocally, and forcefully held that agency determinations as to the coverage and scope of federal contract labor provisions are not subject to judicial review. *Endicott Johnson Corp.* v. *Perkins,* 317 U. S. 501, 63 Sup. Ct. 339 (1943); *Nello L. Teer* v. *United States,* 348 F. 2d 533, 539-40 (Ct. Cl. 1965) and opinions reviewed by the Attorney General of the United States in March 9, 1979 Opinion of the Attorney General, 58 Daily Labor Report p. D-1 *et seq.* (BNA, March 23, 1979).

Moreover, this Court has ruled that judicial assumption of the Secretary of Labor's authorities under the contracting statutes would constitute a plain violation of the Constitutional separation of powers and would not be permitted. *Perkins* v. *Lukens Steel Co.,* 310 U. S. 113, 60 Sup. Ct. 869 (1940). *See also, United States* v. *Binghamton Const. Co.,* 347 U. S. 171, 74 Sup. Ct. 438 (1954), citing with approval the first major appellate opinion regarding the Davis-Bacon Act, *Gilloz* v. *Webb,* 99 F. 2d 585 (5th Cir. 1938), which held that a prior determination by the Secretary of Labor that particular work is covered by the Act, and a prior determination as to the rates to be paid for such work, are absolute conditions precedent to recovery of damages based on such rates.

In accord with the foregoing authority is the well-established rule that courts are without jurisdiction to alter the terms of a contract. *United States* v. *Joseph A. Holpuch Co.,* 328 U. S. 234, 66 Sup. Ct. 1000 (1946); *International Association of Machinists* v. *Hodgson,* 515 F. 2d 373 (2nd Cir. 1975); *United States* v. *Smoler Brothers, Inc.,* 187 F. 2d 29 (7th Cir. 1951); *Framlau Corporation* v. *Dembling,* 360 F. Supp. 806 (E. D. Pa. 1973). In accord, the Comptroller General repeatedly has ruled that executed government contracts may not be revised to include even erroneously omitted Davis Bacon Act Stipulations. *E.g.,* Comptroller General Decision B-144901, 40 Comp. Gen. 565 (1961).

Against and despite the foregoing body of judicial opinion, the Court of Appeals in practical effect has held that the District Court has authority not merely to review decisions of the agencies relative to coverage of the Act and classification of work allegedly performed subject to it for rate determination purposes but has authority to render its own decision *de novo* and to amend contracts accordingly; the Court of Appeals in actuality has held that the District Court has authority to usurp the functions of the agencies and Secretary of Labor as to coverage and classification, and, under guise of "implying" provisions of law into contracts effectively may rewrite contract provisions to the detriment of private contracting parties. The Court of Appeals' decision thus is plainly contrary to all precedent, logic and reason, and reverses a forty-five year history of administration of the Act.

C. The Court of Appeals Erred in Concluding That Davis-Bacon Act Stipulations Were Part of the Contract by Operation of Law, Regardless of Agency Determinations, Because the Act Does Not Operate in the Absence of Agency Determinations

The Court of Appeals' view that the Davis-Bacon Act was incorporated into the contract as a matter of law, and, in turn, that an employee of URA would be permitted to sue on the basis of such contract as amended, fails to appreciate how the Act is constructed and administered.

As noted above, the original Act requiring payment of "prevailing rates" was amended in 1935 to provide for *administrative predetermination* of coverage, classification and rate questions. Those provisions of the Act which provide for inclusion of pre-determined "prevailing rates" specifications in government contracts cannot, therefore, be construed in isolation from other provisions of the Act including the administrative scheme associated with it. The Court of Appeals' error, in holding that pre-

vailing rate specifications were part of the URA/ERDA contract by operation of law, was in ignoring the practical reality that determinations must be made as to what species of projects are "construction," what types of work activities are covered by the terms "mechanic" and "labor" and, what specific "prevailing rates" apply to particular jobs. If the Act is to be meaningfully incorporated into the contract by law, there necessarily must be a parallel incorporation of some legally authorized determination that the work in question was to be "construction," was to be performed by a "mechanic" or "laborer" and would fall within a particular prevailing rate classification. Yet, as was found by the District Court, Mr. Coutu after extensive discovery was unable to show that any such determinations had been made relative to the work performed by him. Moreover, the legislative history and all previous judicial holdings show Congress intended that such determinations are to be made by the contracting agencies and/or the Labor Department in advance of contracting—not by courts (and certainly not by the courts after work has been completed).

Since the agencies have not made a prior determination that the work performed by Mr. Coutu was "construction," or that his job classification was subject to a particular "prevailing rate," and since the District Court plainly has no jurisdiction to decide such questions, incorporation of the Act into the contract is meaningless. Without some *specific* determinations as to coverage, classification and rate, the Act cannot be applied and, in turn, there is nothing for the court to enforce on Mr. Coutu's behalf.

The Court of Appeals noted that the Department of Labor has issued general prevailing rate schedules for the Chicago area including the counties where Fermilab is located (App. 42). The availability of those schedules does not, however, reach the critical issues as to what job classifications and work are covered by the Act and, in turn, covered by such schedules. The Court's lack of focus on these issues proceeds from its failure (unlike

the District Court) to appreciate the fact that because the contract did not contemplate performance of Davis-Bacon Act—covered work by URA employees, some prior and specific determinations that such work was covered had to be made by the agencies in order to activate application of the Act.

Further, and as pointed out by the Solicitor General in the Brief for the United States as Amicus Curiae, the Court of Appeals at least ought to have applied the doctrine of primary jurisdiction if, as it appears to hold, the authority to make coverage and classification decisions is not exclusively the province of the administrative agencies/Department of Labor (Brief for the United States pp. 19-21).[30]

The Court of Appeals' reliance on prior case law incorporating statutory or regulatory terms into contracts by reference is misplaced. None of those opinions involved the Davis-Bacon Act or similar legislation which operates only within the context of pre-contracting administrative determinations. They dealt with matters such as contract termination clause—*G. L. Christian and Associates* v. *United States*, 312 F. 2d 418 (Ct. Cl., 1963) —equal employment opportunity clauses—*United States* v. *New Orleans Public Service Inc.*, 555 F. 2d 459 (5th Cir. 1977)— and the like: *i.e.*, regulatory and statutory provisions which did not require administrative implementation or interpretation in order to be binding on the affected parties.

In short, the Court of Appeals' error was not to recognize that the effect of its decision would be to require the District Court to make after the fact coverage, classification and rate determinations which it is without authority to make.

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30. The Court of Appeals' opinion is contradictory on these questions. At footnote 6 (App. 38) the Court appears to endorse the view that authority to make coverage decisions is accorded exclusively to the Executive agencies or that at least there is an exhaustion requirement. It concluded, however, by remanding that responsibility to the District Court after holding there was no exhaustion requirement (App. 45-46). The Court did not explain this contradiction.

D. The Court of Appeals' Decision Is Inconsistent with the Express Terms of the Act

Even if there were no legislative history or prior judicial opinion concerning the Act, or established administrative scheme, the Court of Appeals' delegation to the District Court of *de novo,* after the fact coverage, classification and rate determinations, is contrary to the literal terms of the Act.

1. The Act Does Not Apply to a Contractor Unless the Bid Specifications Set Forth the Wage Rate Requirements

The Act commences with the direction (40 U. S. C. § 276a-1):

> "The *advertised specifications* for every contract in excess of $2,000, to which the United States . . . is a party . . . shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing . . .;" (Emphasis added.)
>
> (App. 48)

Congress' approach here, obviously was to provide *advance notice,* based on administrative predetermination, as to coverage classification and rates so that the prospective contractor would know precisely what was required. To the same extent that specification, or lack of specification, of design or material requirements would provide notice as to the bases for contracting for such matters, the requirement for specification of labor rates (or the absence thereof) would provide advance notice. For a court to say that the absence of advance notice as to labor rates is no defense to a claim for payment of particular rates is precisely the equivalent of saying that the absence of a particular design, or material specification is no defense to a claim based upon failure to comply with such specification.[31]

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31. The Court's error is compounded in the context of this case, of course, where the contract affirmatively provided for payment of wages at other than the "prevailing" rates claimed by the Respondent.

If that practical consideration were not sufficient, the Act goes on to provide that:

> "every contract *based upon these specifications* shall contain a stipulation that the contractor . . . shall pay all mechanics and laborers . . . computed at wage rates not less than those stated in the advertised specifications, . . ." (Emphasis added.)
>
> (App. 48)

In the plain words of the statute, therefore, a contract cannot be deemed to include "prevailing rate" provisions unless the advertised specifications therefor included such provisions and/or unless the contract was "based upon" such specifications. The Court of Appeals' opinion that the AEC/ERDA-URA contract contained "prevailing rate" specifications by operation of law is therefore a *non-sequitur* because "the law" referred to does not operate in the absence of express provision therefor in the advertised specifications, which are solely within the control of the contracting agency. Since the contractor obviously has no authority to prepare bid specifications, a lawsuit aimed at him for failure of such specifications to prescribe "prevailing rates" obviously is misdirected.

2. The Act Does Not Apply to the Extent the Government Otherwise Has Established Specific Wage Rates

Compounding the Court's error in this case is the fact that the contract in question *did* specify wage rates for various classifications of work, including that of electronics technician. (App. 54-59). Therefore, not only was there a total absence of any stipulation of "prevailing" rates based on bid specifications and precontract determinations *there was express provision for the rate by which Respondent Coutu was to have been paid!* Apropos this circumstance, the Davis-Bacon Act provides, at 40 U. S. C. § 276a-3:

> "[This Act] shall not be construed to supersede or impair any authority otherwise granted by Federal law to provide for the establishment of specific wage rates."
>
> (App. 52)

The Court of Appeals dismissed the import of Section 276a-3 by declining to find the AEC/ERDA had authority to set wage rates. However, and apart from the undisputed fact that Federal funds authorized by appropriations legislation were used to pay URA employees, the authority "otherwise granted by Federal law" is as follows:

a) The Atomic Energy Act of 1954 authorized the Atomic Energy Commission to:

> "make arrangements (including *contracts* . . .) for the conduct of research and development activities" (42 U. S. C. § 2051) (Emphasis added.)

b) The same Act authorized the Atomic Energy Commission to enact regulations necessary to implement policies expressed therein. 42 U. S. C. § 2201(p).

c) Pursuant to such authority, AEC/ERDA has adopted regulations governing its contracting, with not-for-profit entities such as URA, including provision for establishment of wage rates. 41 CFR § 9-1.104 *et seq.;* 41 CFR § 9-15.5006.[32]

Thus, AEC/ERDA had been given contracting authority by Congress, including authority to contract with not-for-profit entities such as URA; terms of such contracts required AEC/ERDA to pay all costs of personnel compensation. It is entirely absurd to suggest that AEC/ERDA would not set the wage rates it is paying for, or to deny that Congress gave AEC/ERDA

32. The Court of Appeals responded to this point by arguing that an Executive Order, No. 10789, impliedly withhold from AEC/ERDA authority to set non-Davis-Bacon Act wage rates (App. 45, at footnote 17). The Executive Order, however, merely recites that:

> "The provisions of the . . . Davis-Bacon Act [citing §§ 276a-276a-5 which includes § 276a-3] . . ., if otherwise applicable, shall apply. . . ."
>
> 1958 U. S. Code, Congressional and Administrative News at pp. 5585-6.

Thus, the Court of Appeals' argument circles back upon itself and fails to explain why § 276a-3 should not be considered applicable.

not only the authority, but the *responsibility* to set such rates. Surely Congress would not knowingly authorize AEC/ERDA to pay government funds for employee compensation with no control thereof. This is particularly true in the case of a not-for-profit contractor, such as URA, who does not stand to gain or lose financially because of wage rate levels

The Court of Appeals' opinion that prevailing rate specifications were part of the contract by operation of law thus cannot be supported within, and in fact is inconsistent with, the framework of the Act itself. Here, the contracting agency concluded that the work contemplated by the contract would not be covered by the Act, wrote the contract on the basis of that determination, and established within the contract a schedule of rates which URA would be authorized to pay, using government funds. By law and lawful regulation, AEC/ERDA was authorized to make those decisions and take those actions. No attempt to appeal therefrom has been made, except via the instant action; however, as shown, and as the District Court found, the courts do not have jurisdiction to substitute their judgments for pre-contract agency determinations especially in a post-contracting case. Accordingly, the Court of Appeals' decision is plainly wrong on the law and should be reversed.

II.

THE ACT IS NOT ENFORCEABLE THROUGH PRIVATE ACTIONS

The Court of Appeals held that its decision in this case "flows directly" from its decisions in *McDaniel* v. *University of Chicago,* 512 F. 2d 583 (7th Cir. 1975), *vacated and remanded,* 423 U. S. 810 (1975), *reaffirmed on remand,* 548 F. 2d 689 (1977), *cert. den.,* 434 U. S. 1033 (1978). Those decisions held that the Act conferred upon a government contractor's employee an implied private right of action in federal court to enforce Davis-Bacon Act contract stipulations written into a

contract; *i.e.*, the Court's opinions in *McDaniel* were made in the context of a motion to dismiss prior to answer and thus were predicated upon the legal assumption that all allegations of fact—including the allegation that the contract therein did contain such stipulations—were correct.[33]

Following the second *McDaniel* decision, in response to a petition for certiorari, the United States as *amicus curiae* expressed to this Court its view that implication of a private right of action under the Davis-Bacon Act was inconsistent with at least two of the four criteria identified by this Court in *Cort* v. *Ash*, 422 U. S. 68, 78 (1975). Brief of the United States as *Amicus Curiae, University of Chicago* v. *McDaniel*, on petition for certiorari, October Term, 1977, at pp. 29-30. The United States concluded, however, that despite the Court of Appeals' failure to follow this Court's direction in *Cort* v. *Ash*, the *McDaniel* decision was not an appropriate vehicle for review of the right of action issue because it was based upon an assumption that the contract there at issue did contain Davis-Bacon Act stipulations, an assumption which, if incorrect, would necessarily require summary dismissal of the suit in any event. Brief, pp. 30-31. Only after receiving those views, did this Court decline to grant review.

---

33. Thus, in its original decision, the Court held:

> "We therefore conclude that plaintiff's complaint, in that it sought to enforce defendant's contractual commitment to pay 'prevailing' wages as determined by the Secretary of Labor, stated a cause of action. . . ." 512 F. 2d at 588.

In its decision on remand, the Court stated:

> "[P]laintiffs-appellants allege that the government contract with appellee *did* contain the prevailing rate requirement. . . . Assuming the facts alleged, the contractor in this case has been unjustly enriched by contracting on the basis of prevailing wage costs, while in fact paying less than the prevailing wage." (Emphasis in the original.) 584 F. 2d 692.

In the instant case, by contrast, the defendant denied that the contract contained such specifications and the District Court granted summary judgment after the Plaintiff conceded he was unable to rebut the denial.

In the instant case, however, the Court of Appeals has gone far beyond its *McDaniel* opinion. Here, it holds not only that the federal courts have jurisdiction over private actions based upon express contract commitments, it has declared that the federal courts may *create* contract obligations even when no such obligation was assumed or even contemplated by the contracting parties, and even in the absence of necessary coverage and classification determinations. In response, the United States as *Amicus Curiae* has re-expressed to this Court its view that the Court of Appeals' decision is inconsistent with at least two of the factors discussed in *Cort* v. *Ash, supra;* the United States also has expressed to the Court its view that the Court of Appeals' extension of the *McDaniel* holding from recognition of a right of action to enforce contracted obligations, to a right of action seeking creation of the obligations *de novo*, is grossly inconsistent with the precepts of the contracting statutes and, as a practical matter, will lead to serious disruption of federal contracting. Brief for the United States as *Amicus Curiae,* pp. 19-23.

The Court of Appeals attempted to justify its recognition of a right of action in this case on the theory that the statutory procedures for enforcement of the Davis-Bacon Act were inadequate (App. 44) and, therefore, that recognition of a private right of action was necessary to achieve the objectives of the Act (App. 44). That approach, substituting the Court's judgment for that of Congress, as to means for achieving the objectives of the Act, is solidly contrary to several recent decisions of this Court. This Court has recognized that it is for Congress, not the Courts, to determine how legislation is to be enforced or administered; the proper question, therefore, is whether or not Congress intended that the policies of the Davis-Bacon Act were to be achieved by private actions or solely by the procedures expressly set forth in the Act. *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* No. 77-1645 (Nov. 13, 1979); *Touche Ross & Co.* v. *Reddington,* No. 78-309 (June 18, 1979); *Cannon* v. *University of Chicago,* 441 U. S. 677

(1979). The Court of Appeals' decisional framework is thus clearly out of step with the views of this Court.

It is clear, moreover, that Congress did not intend that the objectives of the Act were to be achieved via private actions. As shown above, the legislative history of the Act plainly reveals that Congress considered and rejected bills which would have provided individual employees with direct access to the courts for purposes of obtaining judicial review of those administrative determinations upon which the Act operates. If Mr. Coutu's suit were allowed to proceed under the directions given by the Court of Appeals, however, the District Court necessarily would be required to make precisely those types of coverage, classification and rate determinations which Congress decided the courts should leave to the agencies.

It is clear, therefore, that the Court of Appeals' decision contravenes congressional intent and must not be allowed to stand.

Apart from the fact that Congress considered but rejected proposals to give courts authority to resolve the type of issues which are raised by Respondent's complaint, there are other indicia of congressional intent which lead inexorably to the same conclusion. Thus, Congress did, as comprehensively discussed by the Solicitor General on behalf of the United States, provide in the Act procedures for enforcement and an enforcement agency. That Congress did expressly provide means for enforcement presumptively negates any suggestion that other, unstated, means also were provided. *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers,* 414 U. S. 453, 458 (1974). *Brown* v. *General Services Administration,* 425 U. S. 820, 834-35 (1965); *Calhoon* v. *Harvey,* 379 U. S. 134 (1964).

Moreover, the structure of the Act reflects congressional concern with fostering efficiency in government contracting by requiring that bid specifications describe to prospective con-

tractors what is required in the way of labor payments. The concept achieves at least three salutory objectives: one, it removes any uncertainty in the bidding process insofar as labor rates are concerned; two, it fosters uniformity, nationwide, on questions of coverage and application of the Act; and three, it permits projects to proceed without risk of judicial intervention. To permit post-contracting judicial determination as to Davis-Bacon Act coverage and/or application of prevailing rates to particular work projects, obviously would defeat each one of these objectives. Prospective contractors could not rely on agency representations; various courts likely would not be consistent in deciding whether, for example, assembly of a proton-beam target or power supply was "construction" work subject to the Act or experimental work not subject to the Act; and timely completion of projects would be conditional upon the acceptance by each individual employee working thereon, of the agencies' determinations as to application of the Act to his work. Implication of a private right of action as postulated by the Court of Appeals thus not only is inconsistent with legislative intent, it would in practical effect defeat the statutory scheme, and thus must be rejected. *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U. S. 134, 136 (1968); *Williams* v. *Lee*, 358 U. S. 217, 218 (1959).

CONCLUSION.

As shown, the Court of Appeals recognition of a private right of action to compel judicial determination of Davis-Bacon Act coverage of specific work projects finds no support in the law and must be reversed.

Respectfully submitted,

ROBERT E. MANN
Attorney for Petitioner, Universities Research Association, Inc.

SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON
55 East Monroe Street
Chicago, Illinois 60603
(312) 346-8000
Of Counsel

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In the

Supreme Court of the United States

OCTOBER TERM, 1979

UNIVERSITIES RESEARCH ASSOCIATION, INC.,
Petitioner,

v.

STANLEY E. COUTU, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR THE RESPONDENTS

HUGH B. ARNOLD
DANIEL N. KADJAN
ARNOLD AND KADJAN
11 South LaSalle Street
Chicago, Illinois 60603
(312) 236-0415
Counsel of record for Service

ROBERT JAY NYE
NYE AND NYE
420 North Euclid Avenue
Oak Park, Illinois 60302
(312) 386-7373

Attorneys for Respondent Stanley E. Coutu, and the Respondent Class.

The Scheffer Press, Inc.—(312) 263-6850

QUESTIONS PRESENTED FOR REVIEW

1. Whether a government contractor which performs Davis-Bacon Act (40 U.S.C. §§276a-276a-7) "construction, alteration and/or repair" work with its own employees is required to pay those employees the minimum wage rates published in the Federal Register which the Act requires for that work, and is the statutory requirement for payment of those wage rates incorporated in its government contract by operation of law and by reference, when the contract specifies that:

(a) the contractor is responsible for "construction, alteration and/or repair" concerning the public buildings and public works on the government project,

(b) the contractor will include Davis-Bacon Act wage stipulations in subcontracts letting portions of the contract work to others, and

(c) if the contractor performs Davis-Bacon work with its own employees the contract will be modified to incorporate Davis-Bacon Act stipulations.

2. Whether the Supreme Court will consider the question presented by petitioner concerning existence of an employee private remedy under the Davis-Bacon Act, when:

(a) that question was not raised, briefed, argued or ruled on in the proceedings below which have been brought here for review, and

(b) the record does not therefore include (as it did in *McDaniel* v. *University of Chicago,* 7 Cir. 1975, 512 F.2d 583, vacated and remanded for further consideration 423 U.S. 809 (1975), reaffirmed on remand, 1977, 548 F.2d 689, certiorari denied 434 U.S. 1033 (1978)), evidence or admissions establishing the ineffectiveness of certain express remedies provided in the Act.

3. *If the Supreme Court elects to consider this issue presented by petitioner*: Whether wage-earners have a right of action against their contractor-employer to recover unpaid wages required by the Davis-Bacon Act (40 U.S.C. §§276a-276a-7) and by the government contract provisions required by §276a of the Act, when—because there are no contract amounts withheld sufficient to assure employee payments (*see* 40 U.S.C. §276a-2(a)) nor is there a surety payment bond for the protection of employees (*see* 40 U.S.C. §276a-2(b))—such employee right of action is the only remedy available to make effective the congressional purpose of the Davis-Bacon Act to require contractors to pay their employees the wages required by the Act.

LIST OF PARTIES

The petitioner in this Court is Universities Research Association, Inc. Petitioner is the named defendant in a complaint filed in the district court for the Northern District of Illinois. The respondent in this Court is Stanley E. Coutu, on his own behalf and on behalf of a class which has been certified by the district court. The class as so certified is described as follows:

> "All 'mechanics and/or laborers' employed by defendant pursuant to Contract No. AT(49-8)-3000 between defendant and the United States of America 'for construction, alteration and/or repair, including painting and decorating, of public buildings and public works of the United States' who have been paid wages less than 'the wages • • • determined by the Secretary of Labor to be prevailing for the various classes of laborers and mechanics • • • in the city, town, village, or other civil subdivision of the State' in which the work was performed, all as stated and defined in the Davis-Bacon Act, 40 U.S.C. §276a, *et seq.*"

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A. The "right of action" question was not raised, briefed, argued or ruled on in the proceedings below which have been brought here for review. Should the Supreme Court elect, nevertheless, to consider this question, it must be presumed that the courts below have found and concluded (as in *McDaniel* v. *University of Chicago*, 7 Cir., 512 F.2d 583 and 548 F.2d 689, certiorari denied 434 U.S. 1033) that such employee right of action is the only remedy available to make effective the Congressional purpose to require contractors to pay their employees the wages required by the Act. 39

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 78-1945

UNIVERSITIES RESEARCH ASSOCIATION, INC.,
Petitioner,

v.

STANLEY E. COUTU, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR THE RESPONDENTS

STATEMENT OF THE CASE

1. Certiorari was granted in this cause to review a decision of the Seventh Circuit which reversed a summary judgment entered by the district court and remanded the case for completion of discovery and for trial. The district court description of the motion and affidavit, pursuant to which that summary judgment had been entered, is as follows (See J.A. 31-32, 81):

> "Defendant has filed a motion for summary judgment supported by the affidavit of John R. Frazier, Chief Legal Counsel for the Fermi National Accelerator Laboratory claiming that there is no issue of material fact and Defendant is entitled to judg-

> ment as a matter of law. Defendant asserts that the only contract between defendant and the United States government is Contract No. EY-76-C-2-3000, as amended, formerly designated AT(49-8)-3000, and that '[n]o Davis-Bacon Act, 40 U.S.C. §276, *et seq.*, stipulations requiring the payment of prevailing wages have ever been made a part of or incorporated in said contract . . .' [Affidavit of John R. Frazier, para. 3]."

2. An accurate description of the nature of this cause, the government contract in issue, the contentions of the parties, and the conclusions of the court of appeals, is found in the opinion of the Seventh Circuit, *Coutu* v. *Universities Research Association, Inc.*, 595 F.2d 396 (J.A. 35-46). For the convenience of the Court, relevant portions of that opinion are reprinted in the Appendix to this brief, at *Ai*.

3. The government contract pursuant to which respondent and his class were employed manifestly procures and continues today to procure "construction, alteration and repair" of the buildings, facilities and systems at the Fermi National Accelerator Laboratory site owned by our government. Indeed, under the original January 23, 1968 contract and until fourteen modifications and some four years later, the parties had expressly **excluded** "operation, maintenance, and use" from the petitioner's responsibilities. Thus, paragraph "1" of Article XXXVIII of the contract, the last article in the contract, reads (Contract, page 70):

> "The operation, maintenance, and use of the accelerator complex when completed are not within the scope of this contract."

Modification No. 14, dated April 6, 1972, continues the construction responsibilities of the petitioner (see, *e.g.*, Contract, Recitals, Modification No. 14, at 1) and adds—as only part of "Phase II" of the work procured by the contract—certain "operation, use and maintenance" functions. Phase II also added certain "alterations and modifications" and certain "construction of additional new facilities [and] alterations or repair of existing facilities" responsibilities. (Contract, Article II, Modification No. 14, at 8, 10.)

4. Neither petitioner nor the United States as *amicus* has pointed to any governmental ruling or decision characterizing this government contract as not covered by the Davis-Bacon Act. They appear simply to infer the existence of such a ruling from contract provisions which *first* provide that Davis-Bacon Act work under the contract should be subcontracted out by petitioner rather than performed with petitioner's own employees, *second* require that petitioner include in those subcontracts the appropriate Davis-Bacon Act stipulations, and *third* state that if petitioner does use its own employees for Davis-Bacon Act work the contract will be modified to include Davis-Bacon Act clauses so far as petitioner's own workforce is concerned. Those contract provisions, however, are consistent only with conclusions that the contract is covered by the Davis-Bacon Act and that the contracting agency does view it as covered.[1] They both contemplate that Davis-Bacon work is being procured by means of

[1] Further evidence exists, too, establishing that both the petitioner and the agency know that the contract is covered by the Davis-Bacon Act. Discovery, until it was stayed to permit summary judgment proceedings on petitioner's "the contract does not contain express Davis-

the government contract, and require that Davis-Bacon work be subject to contract clauses applicable to that work. Thus, contrary to the contention of the petitioner that the contract "does not specify that [Davis-Bacon prevailing wage] rates be paid" (see "Question Presented", Petr. Brief, at 2), and contrary to the contention of the United States that the contract "has been administratively determined not to call for Davis-Bacon work" (see "Question Presented", *Amicus Brief,* at 1), it is clear that the contract **does** specify that Davis-Bacon wage rates be paid and the contracting agency **has** determined that the contract calls for Davis-Bacon work to which Davis-Bacon obligations are applicable.

5. The petitioner has appended to its contract an "Appendix B" containing certain employee classifications

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[1] (Continued)
Bacon Act stipulations" point, disclosed the existence of approximately 135 forms entitled "Request for Davis-Bacon Determination," dated almost monthly between September 13, 1968 and December 5, 1975. The forms were initially prepared by petitioner, then submitted to AEC/ERDA for the views of the area manager and his three-man "Davis-Bacon Committee," thereafter circulated among the members of the committee, and finally returned to petitioner with a "recommendation" (by the committee) which the area manager "approved" concerning whether or not the Davis-Bacon Act was applicable to the work thus described by petitioner. We do not yet know whether petitioner submitted descriptions of *all* work to be performed under the contract; nor do we yet know how many or which of the forms actually submitted (if any) include work which was performed by the respondent class. Without commenting on the propriety or legal effect of those forms and recommendations, however, there were 129 recommendations that "Davis-Bacon Act *is* applicable" and 6 recommendations that "Davis-Bacon Act is *not* applicable".

and salary and benefit schedules. As the United States has noted (*Amicus Brief*, at 11, n. 11):

> "The hourly rates specified by the contract for contractor employees * * * are somewhat less than the prevailing wages established by the Department of Labor for similar classifications of Davis-Bacon Act workers * * *."

These "Appendix B" classifications and salary schedules do not, under the contract (see, *e.g.*, Contract "Appendix B" at 33; J.A. 61) or under the Davis-Bacon Act, set the upper limit of wages to be paid petitioner's workers. See *United States* v. *Binghamton Construction Co.*, 347 U.S. 171, 177-178 (1954). The contracting agency itself does not view petitioner's action in preparing those classifications and schedules and their attachment to the contract as representing binding contracting agency representations that they are proper. See Kennedy Deposition, at 79-82.

6. The issue in the courts below, and that which was initially presented to this Court in petitioner's certiorari petition (see "Question Presented", Petition, at 2), did not question the very existence of a private remedy to respondent and his class for nonpayment of their Davis-Bacon minimum wages. The appeal below was from a summary judgment based simply on the one sentence in petitioner's counsel's affidavit that

> "No Davis-Bacon Act, 40 U.S.C. §276a, *et seq.*, stipulations requiring the payment of prevailing wages have ever been made a part of or incorporated in said Contract . . ." (Pet. App. C, at A25; J.A. 31-32, 81).

The first district judge to rule on the sufficiency of the complaint had rejected that same contention when he denied petitioner's prior motion to dismiss the suit. See

Pet. Appendix B, at A15; J.A. 24. The Seventh Circuit, in its decision now under review, likewise rejected that contention, declaring (Pet. App. A, at A5; J.A. 39; 595 F.2d 396, 398):

> "We hold that summary judgment was improperly entered against plaintiff and his class because the required wage stipulations were incorporated by operation of law."

The question of the existence of a private remedy was neither briefed nor argued in the Court of Appeals. In fact, that question was treated by petitioner as settled in its brief to the Seventh Circuit (Deft. Brief at 1, 8, 17-18; 7th Cir. Docket No. 78-1165).

After request by this Court that respondent submit a brief in response to the Petition in this cause, our Brief in Opposition was filed. Then Supreme Court Rule 23-1(c) (now Rule 21.1(a)) was quoted and, *inter alia,* respondent and the class pointed out that

> "arguments by petitioner to the effect that respondent has no right of action under or by reason of the Act, and that respondent has failed to exhaust administrative remedies, are not so fairly comprised [in the "Question Presented"] and have already been recently considered by this Court twice in related litigation." (Brief in Opposition, at 26-29.)

The related litigation, there noted, is *McDaniel* v. *University of Chicago,* 512 F.2d 583 (C.A. 7, 1975), vacated and remanded "for further consideration in light of *SIPC* v. *Barbour,* 421 U.S. 412, 95 S.Ct. 1733, 44 L.Ed.2d 263 (1975) and *Cort* v. *Ash,* 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975)", 423 U.S. 809, 96 S.Ct. 20, 46 L.Ed.2d 30 (1975), reaffirmed on remand, 548 F.2d 689 (C.A. 7, 1977), certiorari denied, 434 U.S. 1033, 98 S.Ct.

765, 54 L.Ed.2d 780 (1978). Counsel are the same in both the instant *Coutu* and the *McDaniel* cases, and the University of Chicago is one of the members of petitioner Universities Research Association, Inc.

Certiorari was granted without specific designation by the Court of the issues to be argued. Thereafter petitioner filed its brief on the merits, much of which deals with the question of the existence of a private remedy. See, e.g., Petr. Brief, at 15-21, 28-32, 33. *All* of the brief by the United States as *amicus curiae* deals with that question. See "Question Presented" and "Argument", *Amicus Brief*, at 1, 17.

7. Further, the record in the instant *Coutu* case does not fairly present questions concerning the existence *vel non* of a private remedy on behalf of respondent and his class. *McDaniel* on the contrary did present that record. There the record established, among other things, that no surety payment bonds upon which wage-earners might sue were required of or submitted by the contractor (see *McDaniel* Appendix at 21-22, 7th Cir. Docket No. 73-1438), and that no funds were withheld from the contractor with which to pay those wage-earners (see *Ibid.*, Affidavit at 23-24). We may, of course, speculate in the cause now on review that because of the virtually-identical fact situations presented in both cases, the express statutory remedies here were as ineffective as there. But this Court has never been known for a proclivity to render advisory opinions on questions neither presented nor supported by a record made below. Respondent does not, in this cause, contend that the Davis-Bacon Act contains an alternative private federal remedy for laborers and mechanics who simply choose not to utilize express remedies provided by the Act in situations where those

remedies are effective to afford them the relief intended by Congress. Respondent does submit, however, that if this Court elects to hear and decide questions concerning the existence under the Davis-Bacon Act of a private federal remedy other than on surety payment bonds, fundamental fairness requires that the ineffectiveness of the express statutory remedies otherwise provided in the Davis-Bacon Act be presumed.

SUMMARY OF ARGUMENT

Our respondent employees have performed Davis-Bacon Act work under a Davis-Bacon Act government contract, for which their contractor-employer has paid them less than the published Davis-Bacon Act minimum wage rates. The contract expressly concerns "construction" work, expressly informs petitioner that Davis-Bacon Act duties are applicable to such work, and expressly contemplates that the petitioner pay its own employees in accordance with the Davis-Bacon Act if those employees perform Davis-Bacon work. There is no agency view contrary to the conclusion that this contract concerns Davis-Bacon Act work to which the statutory obligations extend. The Act represents fundamental procurement and socio-economic policies established by Congress. Under applicable legal doctrine and precedents, both the Act and the mandatory government contract clauses prescribed by the Act are part of the contract by operation of law. In addition, references in the contract to the Act, petitioner's experience with applying the Act to its own subcontractors, and petitioner's performance of Davis-Bacon work with its own employees, necessarily imply the incorporation of Davis-Bacon obligations into the contract and oblige petitioner to pay the statutory

wage. The court of appeals correctly concluded that petitioner's mere assertion that the contract contains "no Davis-Bacon Act stipulations" is no basis for a summary judgment in favor of the petitioner-employer.

The question of the existence of an employee right of action to recover unpaid Davis-Bacon Act minimum wages, was not raised, briefed, argued or ruled on in the proceedings below in this cause. In the event the Supreme Court elects to consider this question, the Court must presume a record which reflects—as in the recent related *McDaniel* case, 7 Cir., 512 F.2d 583 (1975), 548 F.2d 689 (1977), certiorari denied 434 U.S. 1033 (1978)—that there are no withheld contract amounts to assure employee payments and no surety payment bond upon which respondents might recover. Our respondents assert, thus, that their right of action exists under circumstances which render other statutory relief unavailable. This employee right of action is the only remedy here available to make effective the Congressional purpose of the Davis-Bacon Act to require contractors to pay their employees the wages required by the Act. Congress created the federal statutory right to these minimum wages and conferred a private right of action on employees under the Act. The Congressional purpose will be undermined in the circumstances of this case absent relief against the contractor-employer by these particular persons intended to be protected by the Act. This remedy is an essential and rational part of and complement to its remedial scheme. There is, finally, no agency—other than our courts—assigned by law to adjudicate respondents' claims and enforce their rights.

ARGUMENT

I.

THE DAVIS-BACON ACT (40 U.S.C. §§276a-276a-7) **REQUIRES PAYMENT TO WAGE-EARNERS OF MINIMUM WAGE RATES CONTAINED IN THE SECRETARY OF LABOR'S PREVAILING WAGE DETERMINATIONS, FOR ALL LABOR CONCERNING "CONSTRUCTION, ALTERATION AND/OR REPAIR INCLUDING PAINTING AND DECORATING, OF PUBLIC BUILDINGS OR PUBLIC WORKS OF THE UNITED STATES"** (see 40 U.S.C. §276a). **THIS STATUTORY REQUIREMENT PREVAILS ALTHOUGH THE CONTRACTOR-EMPLOYER'S GOVERNMENT CONTRACT MAY FAIL TO CONTAIN AN EXPRESS STIPULATION BY THE CONTRACTOR-EMPLOYER TO PAY THE STATUTORY WAGE RATES FOR SUCH WORK.**

A. The Davis-Bacon Act exists to protect employees from substandard earnings by fixing a floor under wages on Government projects. Our respondent class of laborers and mechanics are the "especial" beneficiaries of the Act.

1. The Government contract requires Davis-Bacon work. The Government contract involved in this case clearly contemplates, by its express terms, the performance of construction work within the meaning of the Davis-Bacon Act (40 U.S.C. §§276a-276a-7). Among other provisions, it characterizes the "two categories of work contemplated by this contract" (Contract No. AT(49-8-3000, Appendix "A" thereof) for which petitioner is responsible, as

> "a. Construction: Includes design, fabrication or procurement, erection, test and inspection, assembly

> and installation of the systems, components, buildings, etc., comprising the accelerator and the conventional facilities, as described * * * below.
>
> "b. Research and Development: * * *" [Appendix "A" to Contract, at p. 1.].

Further, by Supplemental Agreement dated April 6, 1972 "effective as of July 1, 1971" the contract was revised, certain prefatory Recitals stating, *inter alia,* that "the Association shall continue the design and construction of the accelerator and related facilities" (Modification No. 14, at 1).

And if that were not enough to demonstrate that petitioner is the contractor primarily responsible for the construction called for by the contract, we also have petitioner characterizing itself as *"This Federally assisted construction contractor"* in a November 25, 1978 certification to the government that it does not maintain segregated facilities for its employees "under its Prime Contract No. AT (4908)-3000".[2]

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[2] The contract, originally dated January 23, 1968, "effective as of January 5, 1967" is not in the trial court record and, of course, not therefore in the Record on Appeal in the Court of Appeals. It, or portions of it, may have been furnished to the district court by the petitioner. Respondent has secured a copy of the contract, or portions of it, through Freedom of Information Act procedures. 5 U.S.C. §552 *et seq.* Discovery procedures initiated by the respondent and his class prior to submission by petitioner of the summary judgment motion which resulted in the district court judgment reversed in this case by the Seventh Circuit, including procedures for production of documents (see J.A. 64 entitled "Amended First Request to Produce"), were stayed pending disposition of the said motion and determination of the legal question presented. See also *Coutu* opinion, 595 F. 2d 396, at 397. It is apparent that there may be other agreements and documents yet to be discovered, concerning petitioner's Davis-Bacon duties.

2. Purpose and policy of the Act to insure payment of prevailing wages.

In *McDaniel I*,[3] the Seventh Circuit, noting that "we should be especially 'alert to provide such remedies as are necessary to make effective the congressional purpose' J.I. Case v. Borak, 377 U.S. 426, 433 (1964), described that purpose as **"insuring the payment of 'prevailing wages** to laborers and mechanics on all government contracts in excess of $2000" and the "basic premise of this legislation • • • to foster economic stability throughout the nation by **requiring** that those employed on federal projects receive fair and equitable wages." (512 F.2d 583, 587; emphasis supplied.) In *McDaniel II*, again holding that a private remedy under the Davis-Bacon Act is necessary to effectuate the intention of Congress in enacting that statute, the court quoted from 1931 and 1964 legislative history and declared, *inter alia*, that "the plaintiff class of laborers and mechanics are the **'especial' beneficiaries** of the Davis-Bacon Act," that the Act "by its terms **mandates** that the contract • • • provide that laborers and mechanics hired by the contractor be paid the minimum wages determined by the Secretary of Labor to be prevailing for the corresponding class of laborers in the locality," that the laborer is "not only the **principal beneficiary of the statute,** but also a third-party beneficiary of a contract provided for by the statute," and that "the **fundamental purpose of the Act was to benefit laborers** and mechanics by paying them wages prevailing in private industry" (548 F.2d 689, 692-693; emphasis supplied). Noting also that "the Supreme Court of the United States recognized in *United*

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[3] The *McDaniel* case involves employees at Argonne National Laboratory in DuPage County, Illinois; the instant *Coutu* case involves employees at the National Accelerator Laboratory in Kane County, Illinois.

States v. *Binghamton Const. Co., Inc.*, 347 U.S. 171, 74 S.Ct. 438, 98 L.Ed. 594 (1954) that laborers are the primary beneficiaries of the Davis-Bacon Act" (*ibid.*), the Seventh Circuit quoted this Court's *Binghamton* holdings that:

> "The language of the [Davis-Bacon] Act and its legislative history plainly show that it was not enacted to benefit contractors, but rather to protect their employees from substandard earnings by fixing a floor under wages on Government projects" (347 U.S. at 176-77, 74 S.Ct. at 441); and "On its face, the [Davis-Bacon] Act is a minimum wage law designed for the benefit of construction workers" (347 U.S. at 178, 74 S.Ct. at 442).

See, also, *Bateson-Stolte, Inc.* v. *United States*, 305 F. 2d 386 (Ct.Cl. 1962), where the court said (305 F. 2d at 389): "Let it be remembered that the provision for the payment of a minimum wage was not for the benefit of the contractor and was no warranty that he would not be required to pay a higher wage. United States v. Binghamton Construction Co. 347 U.S. 171, 74 S. Ct. 438, 98 L.Ed. 594."

3. Right to minimum wage is fixed by the Act. Plainly, if the Davis-Bacon Act is to serve the manifest purpose and policy of Congress, it must be recognized that the Act is remedial and required to be "liberally construed to effectuate its beneficent purpose" (*Drivers, Salesmen, Local Union No 695* v. *N.L.R.B.*, 361 F.2d 547, 553 (C.A. D.C. 1966); *Gillioz* v. *Webb*, 99 F.2d 585 (C.A. 5, 1938)). To construe the Act as requiring payment of the statutory wages only if the government contract contains a commitment by the defendant in language even more express and explicit than that which we already have, is to disregard completely the meaning of the Act, its history, its purpose, and indeed, the basic principle that the goal of

statutory construction is to ascertain and effectuate Congressional intent.[4]

Further, all the authoritative references to the effects and the purposes of the Davis-Bacon Act, speak of rights assured to workmen on government projects by the Act. For example, this Court, also in *Binghamton,* teaches that it is the Act itself which fixes and vests the right to the minimum wage. Thus, "The Davis-Bacon **Act requires** that the wages * * * shall be not less than the minimum wages" (347 U.S. at 172, 74 S.Ct. at 439; emphasis supplied). When referring to the Act, our legislators and our courts uniformly and invariably describe it as legislation which assures payment to such workmen of the statutorily-defined minimum wage. Neither the Congress nor

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[4] See, *e.g., Hudson Distributors, Inc.* v. *Eli Lilly & Co.,* 377 U.S. 386, 395, 84 S.Ct. 1273, 1280 (1964) (stating that where "legislative history clearly indicate[s] the purpose of Congress that purpose must be upheld"); *Commissioner* v. *Bilder,* 369 U.S. 499, 505, 82 S.Ct. 881, 884 (1962) (declaring that "we must give the statute effect in accordance with the purpose so clearly manifested by Congress"); *McLean* v. *United States,* 226 U.S. 374, 33 S.tC. 122, 125 (1912) (stating that the Court must "keep in mind the purpose which impelled the enactment"); *Beley* v. *Naphtaly,* 169 U.S. 353, 359-360, 18 S.Ct. 354, 356) (1898) ("The act of Congress should not be so construed as to except from its remedial provisions those who were without an actual grant * * *. Such a construction ought to be put upon a statute as will best answer the intention which the makers had in view * * *. The equitable construction which restrains the letter of a statute is defined by Aristotle * * *."); *McCown* v. *Heidler,* 527 F.2d 204, 207 (C.A. 10, 1975) ("the Act should be interpreted to attain that end" and "should be construed 'not technically and restrictively, but flexibly to effectuate its remedial purposes' ", and "No legislative enactment should be rendered ineffective to attain its purpose if such a construction can be avoided".).

the courts view the Act (as petitioner would have us view it) as legislation simply establishing contract formalities to be followed or not followed at the whim or pleasure of the contracting parties and, if not followed, of no benefit to workmen otherwise performing Davis-Bacon Act construction work.

4. Character of laborers' work determines coverage. The purpose of the Davis-Bacon Act is, of course, to establish substantive rights of workers actually to receive the benefit of the wage rates which Congress has provided for them when they are engaged upon covered work. Both the Federal Procurement Regulations and the regulations of the contracting agency in the subject case (E.R.D.A., now the Department of Energy, formerly the A.E.C.), confirm that position. For example, 41 C.F.R. §1-18.701-2 (1977 ed.) (Federal Procurement Regulations —Labor Standards for Contracts Involving Construction), states in pertinent part:

> "[C]ontracts predominantly for nonconstruction work may also involve construction work. Construction items under such contracts are not exempted from the requirements of this subpart simply because the work is to be performed under a contract which also requires, for example, the furnishing of supplies."

And again, so far as *E.R.D.A.* regulations are concerned, 41 C.F.R. §§9-18.701-52(b) and (b)(1) (1977 ed.) (Administrative controls and criteria for application of the Davis-Bacon Act in operational or maintenance activities), state in pertinent part:

> "(b) The classification of a contract as a contract for operational or maintenance activities does not necessarily mean that all **work and activities** at the contract location are classifiable as outside of Davis-Bacon Act coverage, since it may be necessary to

> **separate out work which should be classified as covered.** Therefore, heads of procuring activities shall establish and maintain controls for the careful scrutiny of proposed **work assignments** under such a contract to assure that: **(1) * * * If the actual work assignments do involve covered work, the contract should be modified to include applicable provisions of the Davis-Bacon Act.**" [Emphasis supplied].[5]

Thus we see that even under applicable Regulations, it is the actual work performed by a workman which determines whether he is entitled to the Davis-Bacon minimum wage. How the contractor's government contract may be characterized or classified by him or by the contracting agency is not controlling. And it is further clear that under these, as well as previously cited, regulations, the "applicable provisions of the Davis Bacon Act" must be deemed included in the contract and the contract thus appropriately modified, as to work performed by laborers which is within the scope and coverage of the Act. See *Paul* v. *United States,* 371 U.S. 245, 255, 83 S.Ct. 426, 433 (1963) (declaring that Federal Procurement Regulations have "of course, the force of law").

B. Where a government contract clause is required by statute or by procurement regulation to be included in a government contract, that clause is deemed incorporated, as a matter of law, into the contract. The Davis-Bacon Act minimum wage stipulation is part of the subject government contract by operation of law, and employees who perform Davis-Bacon Act work must be paid the minimum wage rates established by the Secretary of Labor's published wage determinations.

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[5] The new Department of Energy regulation is identical. *See* 41 C.F.R. §§9-18.701-52(b) and (b)(1) (1979 ed).

1. **Davis-Bacon clauses in our contract.** Of course, the government contract involved in this cause expressly contemplates that construction work, to which Davis-Bacon Act minimum wage requirements apply, will be performed. The contractor-employer is also required to include all provisions relative to Davis-Bacon Act work in all subcontracts it lets for such construction, although that clause states that it "does not contemplate the performance of [Davis-Bacon] work by the Association, with its own employees". Article XXXIII, para. 1, of the contract (J.A. 55). In addition, however, by letter dated the date of the original contract (January 23, 1968), from the A.E.C. Chicago Operations Office Manager to the president of the petitioner contractor-employer, the further "understandings" of the government and the contractor concerning that contract provision were stated that:

> "If • • • work be performed by the Association with its own employees which AEC determines is subject to the Davis-Bacon Act, *the contract will be modified as appropriate to incorporate the provisions relative to labor and wages required by law.*" [Emphasis supplied.][6] (J.A. 62).

And, further, the district judge to whom the case had first been assigned and to whom, apparently, "a copy of [the contract] ha[d] been submitted • • • by defendant" (J.A. 21), referred in his opinion—rejecting petitioner's motion to dismiss—to further like correspondence between A.E.C. and petitioner, dated April 6, 1972 (the date of Modification No. 14 to the contract), which he

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[6] This is the only other express contract provision *yet* discovered by respondent class relative to Davis-Bacon Act obligations imposed on the contractor-employer itself.

noted "has seemingly been incorporated into the alleged contract" (J.A. 24, 63).

Even in the light of the these *express* contract provisions referring to and confirming the application of Davis-Bacon Act requirements to petitioner itself when and if it performs Davis-Bacon work with its own employees, petitioner still claims that it *itself* is not bound by any such contract provisions, even as to Davis-Bacon Act work *actually performed* by its own employees. Manifestly, the requirements **are expressed in petitioner's contract,** whether or not they are in the precise language that petitioner would prefer.

And as we shall see below, the requirements are in petitioner's contract by operation of law, whether they appear therein via the explicit words which petitioner prefers must be persent, or not.

2. **The Davis-Bacon Act mandatory requirement.** Section 1 of the Davis-Bacon Act (40 U.S.C. §276a) requires, *inter alia,* that

> "every contract * * * **shall** contain a stipulation that the contractor or his subcontrator shall pay all mechanics and laborers * * *the full amounts accrued at time of payment, computed at wage rates not less than those [determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the (locality) in which the work is to be performed]. (Emphasis supplied).

The requirement that every contract involving construction on government projects **shall** contain the required minimum wage stipulation, cannot be construed as any-

thing but mandatory. As was recently said in *Assn. of American Railroads* v. *Castle*, 562 F.2d 1310, 1313 (C.A. D.C. 1977), "The word 'shall' is **the language of command in a statute**, and there is no doubt that the Congress has commanded [what the statute requires]." (Emphasis supplied.)

But we need not rely alone on mere, albeit accurately applicable generalizations. This Court has *already* authoritatively construed the Davis-Bacon Act as mandatory. In *Binghamton*—as here—a government contractor claimed that the wage rates expressly contained in its contract amounted to a binding representation or warranty as to the wage rates which it must actually pay its workers for Davis-Bacon work. This Court concluded—as the Seventh Circuit has concluded in the case at bar—that the contractor's contention must be rejected (347 U.S. at 178, 74 S.Ct. at 442):

> "On its face, the Act is a minimum wage law designed for the benefit of construction workers. **The Act does not authorize or contemplate any assurance** to a successful bidder **that the specified minima will in fact be the prevailing rates.** Indeed, its requirement that the contractor pay 'not less' than the specified minima presupposes the possibility that the contractor may have to pay higher rates. Under these circumstances, **even assuming a representation by the Government as to the prevailing rate, respondent's reliance on the representation** in computing its bid **cannot be said to have been justified.**" [Emphasis supplied.]

Further, it is not only the Davis-Bacon Act itself and the decisions of this Court construing it, which mandate the inclusion of the minimum wage stipulation in our contract. The regulations issued by the Secretary of Labor

pursuant to 40 U.S.C. §276c[7] and Reorganization Plan No. 14 of 1950,[8] complement the requirements of the Act by commanding a like incorporation of the applicable regulations, among which are included the standard contract clauses which stipulate compliance with the Act's minimum wage obligations. See the Secretary's regulations §3.11 (29 C.F.R. §3.11 (1978 ed.)). **"Regulations part of contract"**. Here, too, there is no doubt that "the verb 'shall' in the regulation is mandatory", *Ainslie Corp.* v. *Middendorf,* 381 F.Supp. 305, 308 (D.Mass. 1974).

3. Incorporation of mandatory clauses—the "Christian Doctrine". It is clear that the Davis-Bacon Act minimum wage provisions represent long-standing and fundamental procurement policies of the United States. The cases which deal with government contracts teach that contract clauses made mandatory by **procurement regulation,** are incorporated into government contracts as a matter of law. Is it not even more certain that contract clauses made mandatory by **statute** are so incorporated as a matter of law! Dees and Ginsburg, *Contract Interpretation and Defective Specifications* at 4 (Government Contracts Monograph No. 4, 1975 Edition; The George Washington University); *G.L. Christian and Associates* v. *United States,* 312 F. 2d 418, 160 Ct. Cl. 1, opinion on reargument denied 320 F. 2d 345, 160 Ct. Cl. 58, certiorari denied 375 U.S. 954 (1963), rehearing denied 376 U.S. 929, 377 U.S. 1010 (1964). See also, e.g., *United States* v. *New Orleans Public Service, Inc.,* 553 F.2d

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[7] Section 2 of the Copeland (Anti-Kickback) Act of June 13, 1934, c. 482, 48 Stat. 948; as amended May 24, 1949, c. 139, §134, 63 Stat. 108, and August 28, 1958, P.L. 85-800, §12, 72 Stat. 967.

[8] 5 U.S.C. §903 note, 15 F.R. 3176, 64 Stat. 1267.

459 (C.A. 5, 1977); *City of Tullahoma* v. *Coffee County,* 204 F. Supp. 794 (E.D. Tenn. 1962), rev'd on other grounds 328 F. 2d 683 (C. A. 6, 1964).

In Dees and Ginsburg, *Contract Interpretation and Defective Specifications* (Government Contracts Monograph No 4, 1975 Edition; The George Washington University), the authors cited, among others, the three federal statutes that "impose certain minimum standards for wages * * * of employees working for Government contractors" (*id.,* at 1-2), spoke of the rule that such "statutory requirements and regulations which implement [them] have the force and effect of law [and] contracts made in violation of such requirements are illegal" (*id.,* at 3), and discussed the doctrine which requires that government contracts be interpreted as incorporating mandatory clauses specified by law:

> "In *G. L. Christian & Associates* v. *United States,* the Court of Claims held that the Termination for Convenience clause which had been **consciously omitted by the Government (and the contractor)** had the force and effect of law and was incorporated in the contract as a matter of law. The Court emphasized the fact that **pertinent regulations made the incorporation of the clause in a contract mandatory** and that a Termination for Convenience clause was historically an important component of a Government contract." (*id.,* at 4; emphasis supplied.)

So far as the *Christian* case opinions themselves are concerned (*Christian I,* 312 F.2d 418, 160 Ct.Cl. 1 (1963); and *Christian II,* 320 F.2d 345, 160 Ct.Cl. 58 (1963)), it should be noted that there the contractor's prime objection to the "incorporation" doctrine was that the subject contract clause was required only by "pre-existing **regulation,**" the court pointing out that there was *no* question

but that "if a **statute** requires the inclusion of a * * * clause, such a provision would be read into the agreement **whether the negotiators put it there or not**" (320 F.2d at 350; emphasis supplied). And, speaking further concerning the "incorporation" doctrine, the Court of Claims said (320 F.2d at 350-351):

> "**The concept of such incorporation is not novel.** * * * It was important then, and it is important now, that **procurement policies set by higher authority not be avoided or evaded** (deliberately or negligently) **by lesser officials, or by a concert of contractor and contracting officer.** * * * **Obligatory Congressional enactments are held to govern federal contracts because there is a need to guard the dominant legislative policy against** *ad hoc* **encroachment or dispensation by the executive** [citation]."
>
> "Like other individuals who deal with the Federal Government [citation], potential contractors can validly be bound to discover the published directives telling them the limits and the scope of the agreements the Government can make. Our concern is not at all whether the policy of embodying mandatory contractual provisions in regulations is the best one. Our special interest is only the legality of such a practice, and we hold that, in the procurement field as in others, an authorized regulation can impose such peremptory requirements on federal officials and those who seek to enter into transactions with the Government." [Italics by the court; other emphasis supplied.]

See too, *e.g., United States* v. *New Orleans Public Service, Inc.*, 553 F.2d 459, 469 (C.A. 5, 1977), holding "**the clause is incorporated into the contract, even if it has not been** expressly included in a written contract or **agreed to by the parties**"; *Compagnie Generale Transatlantique* v. *American Tobacco Co.*, 31 F.2d 663, 666 (C.C.A. 2, 1929),

holding that "a lawful statute in force at the time the contract was made is read into the contract and becomes part of it" and "Such a **contract must be and is deemed to be modified to conform to the statute**"; 3 *Corbin on Contracts,* §551, at 200-201 (1960 ed.), noting the same result "even though the parties **know nothing** of the statute and do not include the provision, and **even though they know of it and expressly agree upon the exact contrary**"; 17A Corpus Juris Secundum, *Contracts,* §330, at 301 (1963 ed.), noting that "where a provision is integrated into a contract by force of statute, as a matter of public policy, it must be interpreted and given effect in accordance with the intention of the legislature, irrespective of how the contractors understood it".

Also of particular signifiance on this point is this Court's opinion in *Hartford Accident & Indemnity Co.* v. *N. O. Nelson Mfg. Co.,* 291 U.S. 352, 54 S.Ct. 392 (1934), where the Court required that a contractor's bond be construed to include a clause required by state statute but omitted from the express terms of the bond, and said:

> "**All that the statute does** by force of section 3 **is to standardize the form,** at least in some particulars, when bonds are freely given, and to define the consequences attaching to the standard thus prescribed. * * *
>
> "Liberty of contract is not an absolute concept. [citations.] It is relative to many conditions of time and place and circumstance. * * * Principal and surety in writing it **became subject to the statutes then in force, and by these they must abide.**" [291 U.S. at 359, 360-361; 54 S.Ct. at 395-396; emphasis supplied.]

4. Applicable prevailing wage determinations exist. The district court entered the summary judgment, the reversal of which by the Seventh Circuit is here on

review, under the erroneous belief that there are and have been no prevailing wage determinations by the Secretary of Labor applicable to the subject government contract. On the last page of its Memorandum Order, the court commented that "it would be improper for this court to declare in the first instance that this contract is now subject to the Davis-Bacon Act and to make appropriate wage determinations for the parties" (see J.A. 34). The trial court need have had no such concern. For many years the Secretary of Labor has issued wage determinations, all published in the Federal Register, appliacble to labor on government projects in Kane County, Illinois, where the subject project is located and where the construction activities required under the contract are being and have been performed. See Statement of Arthur J. Goldberg, Secretary of Labor (Hearings on *Administration of the Davis-Bacon Act,* Committee on Education and Labor of the House of Representatives, 87th Cng., 2d Sess., 1962), at 47, 48, 50; 29 Code of Federal Regulations, *Labor,* Subtitle A, Part I, *Procedures for Predetermination of Wage Rates,* §§1.5(b) and 1.7(a)(2) (1977 ed.); 43 Federal Register 11360, 11379-11383 (March 17, 1978); 42 Federal Register 30078 et seq. (June 10, 1977).

There is no problem in locating the published "General Wage Determinations Decisions" of the Secretary of Labor. One of the most recent compilations is found in 43 Federal Register 11360 *et seq.* (March 17, 1978) and, of course, constructive notice of those determinations exists by reason of their publication in the Register (see, e.g., *Art Center School* v. *United States,* 142 F.Supp. 916, 918 (Ct.Cl. 1956); *Winston Bros. Company* v. *United States,* 458 F.2d 49, 52-53 (Ct.Cl. 1972).

C. A contractor takes a government contract subject to all applicable statutes. All statutes relating to the subject matter of the contract and existing at the time of contracting become a part thereof and must be read into the contract. Our petitioner contractor-employer is charged with knowledge that construction work performed by its employees is subject to the Davis-Bacon Act, and is obligated to pay the statutory wage rates.

1. Davis-Bacon Act is part of all government construction contracts. Whether or not the mandatory stipulation required by the Davis-Bacon Act to be included in "every contract * * * for construction, alteration, and/or repair, including painting and decorating, of public buildings or public works * * *" is deemed incorporated, as a matter of law, into the contract, it is basic hornbook law that *the Davis-Bacon Act itself* is a part of the contract. Statutes relating to the subject matter of a contract and existing at the time of execution of such contract, become a part thereof and must be read into the contract, as if they were expressly referred to or incorporated in its terms.

See, *e.g., Woods* v. *Lovett,* 313 U.S. 362, 370, 61 S.Ct. 983, 987 (1941) ("laws which subsist * * * enter into and form a part of it, as if they were expressly referred to or incorporated in its terms"); *Home Building & Loan Assn.* v. *Blaisdell,* 290 U.S. 398, 429-430, 54 S.Ct. 231, 237 (1934) (concerning Minnesota Mortgage Moratorium Law); *Farmers' & Merchants' Bank* v. *Federal Reserve Bank,* 262 U.S. 649, 660, 43 S.Ct. 651, 655 (1923) ("This principle embraces alike those laws which affect its construction and those which affect its enforcement or discharge"); *Hendrickson* v. *Apperson,* 245 U.S. 105, 38 S.Ct. 44, 45 (1917) (Kentucky statute authorizing appointment of special collectors); *Northern Pacific Ry. Co.* v.

Wall, 241 U.S. 87, 91-92, 36 S.Ct. 493, 495 (1916) (Carmack Amendment to the Interstate Commerce Act); *Southern Surety Co.* v. *Oklahoma,* 241 U.S. 582, 587, 36 S.Ct. 692, 694 (1916) (Oklahoma enabling act and Oklahoma Constitution); *Armour Packing Co.* v. *United States,* 209 U.S. 66, 81, 82, 28 S.Ct. 428, 435, 436 (1907) ("the design of the statute to prohibit" "abuses of unequal rates"); *Antoni* v. *Greenhow,* 107 U.S. 769, 2 S.Ct. 91, 95 (1883) (rule applies to "those laws which affect its validity, construction, discharge, and enforcement"); *Walker* v. *Whitehead,* 83 U.S. 314, 317, 21 L.Ed. 357, 358 (1873) (Georgia statute held to impair obligation of contract); *United States ex rel. Von Hoffman* v. *City of Quincy,* 71 U.S. 535, 550 (1867) ("These are as much incidents and conditions of the contract as if they rested upon the basis of a distinct agreement"); *M'Cracken* v. *Hayward,* 11 L.Ed. 397, 399 (1844) ("laws in existence * * * measure of the obligation to perform"); *Ogden* v. *Saunders,* 6 L.Ed. 606, 621-622 (1827) ("the law of the contract * * * forming a part of it"); 17A C.J.S., *Contracts,* §330, at 295 (1963 ed.); 17 Am.Jur.2d, *Contracts,* §257, at 654-656 (1964 ed.); 3 *Corbin on Contracts,* §51, at 197 (1960 ed.); *Williston on Contracts,* §615, at 1767 (1936 ed.); 4 *Williston on Contracts,* §615, at 597 (3d ed. 1961). Thus, as the Ninth Circuit declared in *United States* v. *McKinnon,* 289 F.2d 908, 909 (C.A. 9, 1961), concerning a claim for extra work by a government contractor, "one just must take his government contracts subject to applicable statutes."

2. Petitioner's actions imply assumption of Davis-Bacon obligations. It is asserted in this cause by respondent and the respondent class that they, as employees of the petitioner, were assigned and did perform work constituting construction work within the meaning of the

Davis-Bacon Act. At this point in the proceedings, and for purposes of the summary judgment now on appeal which was granted on other grounds, this assertion must be taken as true. It is clear, then, that to the extent the petitioner's employees were performing Davis-Bacon Act construction work so assigned to them, the petitioner is and has placed itself in the position of a subcontractor under its prime contract. Article XXXIII ("Labor Provisions") of the contract prescribes that such work is to be done by subcontract which shall "contain the provisions relative to labor and wages" required by Davis-Bacon. In the capacity of a subcontractor performing construction work on the project, well knowing of the contract requirement that all such subcontractors are obligated to pay the statutory wages, petitioner must be deemed by implication to have undertaken those same obligations.[9]

It is not unusual for a general contractor also to act as a subcontractor on the job. Indeed, in *Bushman Construction Co.* v. *Conner*, 260 F.Supp. 779 (D.Colo., 1966), it is noted that "The prime contractor did only the cement and carpentry work. All of the other construction was subcontracted" (260 F.Supp. at 782). And anyone familiar with construction activities is familiar with the practice of the general contractor "acting as his own carpentery (or cement, or electrical, or plumbing, or painting) subcontractor."

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[9] Indeed, petitioner in its capacity as prime contractor has entered into a number of construction subcontracts, all including the Davis-Bacon Act required stipulations and the standard contract clauses promulgated by procurement regulations and included within printed forms used with those subcontracts. Copies of certain of those subcontracts have been obtained by the respondent class, again through Freedom of Information Act procedures. 5 U.S.C. §552 *et seq.*

That which is implied in a contract situation is as effectual as what is expressed. *Bulkley* v. *United States,* 86 U.S. 37, 40 (1874) (saying, in addition, that "Human affairs are largely conducted upon the principle of implications"; *Board of Supervisors* v. *Lackawanna Iron & Coal Co.,* 93 U.S. 619, 624, 23 L.Ed. 989, 991 (1877); *Perry* v. *Sindermann,* 408 U.S. 593, 599-602, 92 S.Ct. 2694, 2699-2700 (1972) (affirming reversal of a summary judgment in a teacher's action claiming the existence of a "*de facto* tenure program" for "absence of such an explicit contractual provision may not always foreclose the possibility"). Indeed, the rules with respect to the creation of implied contracts apply in government contract situations, and "A contract may be implied where all the formalities in connection with the execution of a contract have not been complied with" (91 C.J.S., *United States,* §89, at 170 (1955 ed.)).

Assuming then, *arguendo,* that by reason of the government contract in the case at bar our petitioner-contractor is not bound by the Davis-Bacon Act in its capacity as *prime contractor,* it is nonetheless bound as a *subcontractor* who, without question, is expressly authorized by that contract to perform Davis-Bacon Act work and likewise obliged to pay the statutory wage.

D. Contrary to petitioner's Point I.D. (Petr. Brief at 25-28), **the Seventh Circuit's decision is not inconsistent with express terms of the Davis-Bacon Act. The defense that a contract was not advertised or bid, but is instead a negotiated cost-plus-a-fixed-fee contract, was expressly anticipated by Congress in 40 U.S.C. §276a-7. Further, the claim that federal law grants AEC/ERDA/DOE authority to establish contrary specific wage rates is not true and is no defense under 40 U.S.C. §276a-3.**

1. Davis-Bacon applies to all contract types. Petitioner has plainly forgotten to read the last section in

the Davis-Bacon Act. Congress in that section anticipated the very defense which petitioner now asserts in its sub-point I.D.I. (Petr. Brief, at 25-26). That sub-point is entitled "The Act Does Not Apply to a Contractor Unless the Bid Specifications Set Forth the Wage Rate Requirements" (*Id.* at 25). Yet Congress has mandated to the contrary:

> §276a-7. *Cost-plus-a-fixed-fee contracts; contracts without advertisement*
>
> The fact that any contract authorized by this or any other Act is entered into without regard to section 3709 of the Revised Statutes of the United States [41 U.S.C. §5], or upon a cost-plus-a-fixed-fee basis or otherwise without advertising for proposals, shall not be construed to render inapplicable the provisions of the Act of March 3, 1931, as amended by the Act of August 30, 1935 (49 Stat. 1011; U.S.C., title 40, sec. 276(a)), if such Act would otherwise be applicable to such contract.[10]

2. No federal law or approval for contrary wage rates. Simply because AEC/ERDA/DOE has authority to enter into contracts does not mean that it has authority to "provide for the establishment of specific wage rates" within the meaning of 40 U.S.C. §276a-3. Further, the mere fact that certain employee classifications and salary schedules were prepared by petitioner and appended to its contract, does not mean that AEC/ERDA/DOE has established those classifications and rates. Nor does that contracting agency itself view petitioner's action in preparing those classifications and schedules and their attachment to the contract as representing binding contracting agency representations that they are "established" (see, e.g., Kennedy Deposition,

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[10] See also 41 U.S.C. §258 to the same effect.

at 79-82). Petitioner's sub-point I.D.2. (Petr. Brief, at 26-28, entitled "The Act Does Not Apply to the Extent the Government Otherwise Has Established Specific Wage Rates" (*Id.*, at 26), is without substance. As the Seventh Circuit said (595 F.2d at 401-2) in this connection, among other things "defendant has been unable to identify anything in the Atomic Energy Act or any other federal statute that authorizes ERDA to establish specific wage rates."

The Portal-to-Portal Pay Act, at 29 U.S.C. §259(b(3), designates the only agency upon whose written determinations a contractor may rely in defense of its failure to pay Davis-Bacon minimum wages. That agency is the Secretary of Labor, not ERDA nor any other agency, administrator or department. And finally, this Court's *Binghamton* decision precludes petitioner's claim that a contracting agency — whether the Corps of Engineers there or the AEC/ERDA/DOE here — gives "assurance" to the contractor that wage rates included in a government contract "will in fact be the prevailing rates" (347 U.S. at 178).[11]

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[11] At least since the *Binghamton* decision in 1954, and most probably for many years before, government contractors acknowledged that it is the *contractor's* responsibility under the Davis-Bacon Act properly to classify and set rates for their workmen, rather than a responsibility of the contracting agency. See, e.g., the prepared statement of the Associated General Contractors of America before the Special Subcommittee on Labor of the Committee on Education and Labor of the House of Representatives (H. Hrgs. 1962 on "Administration of the Davis-Bacon Act", at 456-457): "The Davis-Bacon Act requires that *contractors* classify and pay their mechanics and laborers at least the required minimum wage rate for the classification commonly used to perform the particular work in the locality of the project" (Emphasis supplied.).

E. The Davis-Bacon Act 1935 amendments were intended, inter alia, to prevent utilization by contractors and agencies alike of every device resulting in non-payment of proper prevailing wages at government projects, including the "arbitrary classification" and "underclassification" device.

1. Senate hearings and Davis-Bacon violations. The 1935 amendments expanded the scope of the Act and sought to prevent all abuses to which the prevailing wage principle in the 1931 Act had been subjected. They were adopted after lengthy hearings in 1934 before a Subcommittee of the Committee on Education and Labor of the Senate, pursuant to Senate Resolution 228 authorizing "an investigation of the relationship existing between certain contractors and their employees in the United States". During those hearings it became clear that the 1931 Davis-Bacon Act requirements were being disregarded on large numbers of government projects. Neither size of the project, nor identity of the government department for which it was being performed, served to insulate a project from non-compliance. None were immune. Sworn testimony was heard concerning devices to evade payment of prevailing wages at, among others, the Department of Justice Building (S. Hearings, at 83-85, 91, 108, 117), the Senate Office Building (*Id.*, at 87), the New House Office Building (*Id.*, at 90-91, 109-117, 152, 153), and even the United States Supreme Court Building in which this brief has been filed and this cause is now pending (*Id.*, at 91, 117).[12]

2. The "arbitrary classification" and "underclassification" device. Among the devices which Congress was in-

[12] More than 90 other federal projects, in the District of Columbia and elsewhere around the nation, were the subject of like testimony at the Senate Subcommittee hearings.

formed were in use as a means to deprive workers on government projects of the prevailing wage which Congress had in 1931 directed that they receive, was the so-called "arbitrary classification" or "underclassification" device. Thus, in its report submitted pursuant to S. Res. 228 (S. Rept. No. 332, part 2, 74th Cong., 1st Sess.), the Committee on Education and Labor, chaired by Senator Walsh, pointed out;[13]

> "Instances of failure by Federal Emergency Relief Administration officials to pay the prevailing wages on Public Works projects, and the creation by such officials of arbitrary classifications known as semi-skilled labor" (S.Rept. No. 332, part 2, at 2).
>
> "[T]he matter of classification, with the result that many contractors were able to circumvent the law by hiring mechanics as common laborers, and then assigning them to tasks which fell within the purview of one of the skilled crafts" (*Id.* at 5).
>
> "The Board of Labor Review [created to hear issues under contracts by the Public Works Administration pursuant to the National Industrial Recovery Act] heard many cases in connection with these complaints [concerning "new grades and classifications * * * permitting high-grade skilled laborers to be placed in lower categories so that their rates of pay were less than those prevailing for skilled labor"] but, in the opinion of this committee, have been unable to rectify conditions as affecting a considerable portion of the underclassified laborers" (*Id.*, at 12). "The * * * rates * * * have been largely broken down by intermediate classifications of labor * * *.

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[13] Testimony concerning the "arbitrary classification" device is found in S. Hrgs, Ed.-Lab Subcom. (1934) at 76-77, 82-83, 105, 108, 110, 138, 160, 161, 206, 211, 212, 213, 414, 460, 469, 471, 473, 483.

> The whole tendency has been for wages of the skilled group to descend toward the level of the unskilled group, this by reason of intermediate classification devices" (*Id.*, at 16-17).

These "arbitrary", "under-", "mis-", and "intermediate" classifications had the effect, of course, — if not the purpose — of reducing wages being paid to workmen on government projects below Congress-mandated prevailing wage rates for similar work elsewhere in the community. They still have that effect, and in this cause now on review concerning these respondent workmen before this Court. For, as accurately noted by the United States as *amicus curiae* (*Amicus* Brief, at 11, n. 11):

> "The hourly rates specified by the contract for contractor employees * * * are somewhat less than the prevailing wages established by the Department of Labor for similar classifications of Davis-Bacon Act workers * * *."

3. Neglect of the prevailing wage principle. Congress, of course, can only legislate; it is for the other agencies of government to apply Congresional policy. Yet Congress was informed in the Senate Subcommittee hearings, of numbers of instances where agencies were either ineffective concerning or neglectful of the Davis-Bacon Act minimum wage principle. Thus the Senate Committee on Education and Labor reported that there is "laxity toward contractors guilty of improper practices [existing] in certain Government departments" (S. Report No. 332, part 3, 74th Cong., 1st Sess., at 3), that notwithstanding complaint to certain agencies "no action was forthcoming" (*Id.*, at 4), and that "It is not apparent to the committee in the survey it has caused to

be made * * * that any agencies have been effective in obtaining the results set out for them" (*Id.*, at 16).[14]

The hearings further revealed the identity of many government projects concerning which, notwithstanding claims made to government agencies, workers had *never* received payment or restitution for unpaid portions of their wages.[15] Deficiencies in the District of Columbia alone were asserted to "run into the millions" (S. Hearings, 1934, at 6).

F. The Executive and the Judiciary must defer to Congressional policies represented by the Davis-Bacon Act. The Davis-Bacon Act Congressionally-mandated effects on the procurement process may not be avoided, even to satisfy other proper procurement objectives.

No one can deny that the procurement process would be easier and cheaper for the government and for certain government contractors, had Congress not enacted the Davis-Bacon Act (40 U.S.C. §276a *et seq.*), the Walsh-Healey Public Contracts Act (41 U.S.C. §35 *et seq.*) and the McNamara-O'Hara Service Contract Act (41 U.S.C. §351 *et seq.*). Yet these statutes represent important

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[14] Testimony supporting these conclusions is in Hearings before the Subcommittee of the Committee on Education and labor of the U.S. Senate, 73d Cong., 2d Sess., pursuant to S.Res. 228 (1934), at, e.g. 16-17, 18, 24, 30, 60, 62, 68-69, 95-96, 138, 141, 142, 144, 150, 176, 181, 538, 623.

[15] Among these projects were, again, the Department of Justice Building (S. Hearings, 1934, at 84), the New House Office Building (*Id.* at 91), the N.Y. Federal Courthouse (*Id.* at 137, 138), and others noted at *Id.* 6, 10, 17, 18, 19, 21, 24, 26, 32, 60, 76, 88, 89, 107, 118, 141, 142, 193, 203, 259. The workers *were* made whole, however, concerning the Supreme Court Building project (*Id.* at 91).

policy decisions which have been consistently reaffirmed by Congress, notwithstanding their impact on the procurement porcess.[16] Thus, the Attorney General of the United States, in an opinion issued on March 9, 1979, in response to a request of the President (43 Op. Atty. Gen. (op. no. 14); see 1979 Labor Law Reports (C.C.H.), ¶31,253 (4-13-79)), has noted:

> "Congress considered the contract labor standards statutes to be among the 'ancillary' statutes which affect procurement [citing at fn. 32: S.Rept.91-427, 91st Cong., 1st Sess., at 6, 13-14; H.R.Report 91-468, 91st Cong., 1st Sess., at 151.]. * * *
>
> "[These are] statutory socio-economic programs implemented through the procurement process * * * [which the 1969 Commission on Government Procurement] viewed * * * as extraneous burdens on the procurement system [noting at fn. 49: See CGP Report, vol. 1, at 111-18. The report refers to the Labor Department's wage-hour regulations as 'collateral' ones that 'affect' procurement. Id. at 33.]
>
> "As the Commission report points out, these programs serve a broad variety of interests: labor, environment, small business, anti-discrimination, protection of domestic industry, and others. * * * The contract wage-hour statutes in particular are the result of a strong legislative concern that the government's general interest in efficient, economical procurement will not be satisfied at the expense of contractors' employees. [noting at fn. 52: See H.R. Rept. 1162, 74th Cong., 2d Sess., at 2 (Davis-Bacon Act); S.Rept. 1157, 74th Cong., 1st Sess., at 4 (Walsh-

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[16] "[A] clear public policy of insisting that *all* who do business with the Government pay employees minimum prevailing wages thus seems to be indicated." Statement of the Deputy General Counsel, *Office of the Comptroller Gener*al, H.R. Hearings, 1962, at 287 (emphasis supplied).

Healey Act); H.R.Rept. 948, 89th Cong., 1st Sess., at 3 (Service Contracting Act).]."

The effects of the legislative policies represented by the Davis-Bacon Act and thus described, are effects which the government procurement agencies and government contractors must accept, and to which the courts must defer. Our petitioner has, of course, any number of contractual, administrative, judicial and statutory remedies in proceedings involving the government, for any uncertainties, inequities and improprieties petitioner has sustained or may hereafter suffer by reason of its contract.[17] Congress has authorized a suspension of the provisions of the Act only by the President, and by him only "in the event of a national emergency" (40 U.S.C. §276a-5). Its requirements cannot be suspended, nor liability for violation of its provisions defended, by simply disregarding or neglecting it.

G. The decision of the Seventh Circuit does not affect administrative functions under the Davis-Bacon Act. Further, there is no administrative procedure available to an employee for adjudication and vindication of his claim that he has performed Davis-Bacon Act work under a Davis-Bacon Act contract, for which his contractor-employer has not paid the published Davis-Bacon Act minimum wage.

The Seventh Circuit in the case at bar has done nothing to affect or impair whatever any administrative func-

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[17] See, for example: (a) Contract Disputes Act of 1978, 41 U.S.C. §§601-613, P.L. 95-563, (b) Wunderlich Act, 41 U.S.C. §§321-322, (c) 42 U.S.C. §7194(a)(b), providing for Department of Energy adjustments to rules, regulations and orders to prevent special hardship, inequity or unfair distribution of burdens, (d) Disputes Clause, AEC/ERDA/DOE regulations, 41 C.F.R. §9-7.802-5, (e) Equitable Adjustments Clause, AEC/ERDA/DOE regulations, 41 C.F.R. §9-1.5004-2.

tions assigned by the Davis-Bacon Act. Its decision that the Act applies concerning this government contract has no effect on the functions of the Secretary of Labor in making the prevailing wage rate determinations upon which respondent here relies (40 U.S.C. §276a), the functions of the Comptroller General to pay over to laborers (from any accrued contract payments which may have been withheld) any wages found to be due them pursuant to the Act (40 U.S.C. §276a-2(a)), or the functions of the Comptroller General to distribute a list of defaulting contractors to all departments of the government (40 US.C. §276a-2(a)).

Further, the decision does not interfere with or disregard any agency or agency procedure assigned by law to adjudicate respondent's claims and vindicate his rights. There is no such agency, nor any such procedure. The court of appeals sought unsuccessfully to uncover some (see 595 F.2d 396, 400; J.A. 43); the United States noted that there is none (see *Amicus Brief*, at 9, fn. 7);[18] and the petitioner has failed to point to one. Finally, the Solicitor of Labor, the Comptroller General, and even the (then) Atomic Energy Commission, have all testified (H.R. Hearings before the Special Subcommittee on Labor of the Committee on Education and Labor, on "Administration of the Davis-Bacon Act", 87th Cong., 2d Sess., 1962) that even among the agencies themselves there is no agreement concerning decision-making under the Act—except for the above-noted functions explicitly

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[18] "There is no administrative procedure now available expressly providing review * * *. Several contracting agencies, including the Department of Energy, have objected to the proposed regulations * * *." (*Ibid.*)

assigned by the Act itself.[19] Is it any wonder, then, that neither the Seventh Circuit nor the United States nor the petitioner nor the respondent has found an agency—other than our courts—in which the within claims and rights can be adjudicated and enforced.[20]

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[19] See, for views of the *Labor Department* on this "situation which is presently complicating effective administration and enforcement of the act", H.R. Hearings 1962, at 831-832, 901-902 ["we say the law has meant one thing and * * * the Comptroller General * * * has said that it means another"], 912-919; for views of the *Comptroller General* that "jurisdiction over enforcement activities under the act is at best divided", H.R. Hearings 1962, at 284, 285 ["delays enforcement action and promotes inconsistencies"], 285-286 ["assumption of authority to determine amounts of wage underpayments under * * * the Secretary's regulations has caused conflict"], 290, 295 ["The Davis-Bacon Act, itself, appears to make us responsible for determining the extent of violations for purposes of debarment and wage adjustments"], 297 ["Nobody is given the authority to make the final determination. Certainly it is denied to the contracting agencies and is not given to the Secretary of Labor."], 298-300, 321, 322, 1127-1128 ["the Secretary of Labor must be eliminated from consideration for the reason that there is no language giving him authority except that of determining prevailing wage rates. * * * Nowhere is a contracting agency authorized to make final determinations of the amounts due aggrieved workers * * *.], 1128-1131; for views of the *Atomic Energy Commission*, H.R. Hearings 1962, at 615-616, 619-620 ["It is all very informal and sort of works this way."], 634-635 ["A.E.C. procurement regulations * * *are not regulations in the most formal sense * * *."].

[20] In addition to the noted conflict among the agencies as to which has what functions in attempts to enforce the Davis-Bacon Act, it is also clear that the statutory scheme does *not* place the matter of construction of the coverage terminology within the special competence of any of the various agencies. As the *Solicitor of Labor* advised in his additional prepared statement, H.R. Hearings,

II.

WAGE-EARNERS HAVE A RIGHT OF ACTION AGAINST THEIR CONTRACTOR-EMPLOYER TO RECOVER UNPAID WAGES REQUIRED BY THE DAVIS-BACON ACT (40 U.S.C. §§276a-276a-7) **AND BY THE GOVERNMENT CONTRACT PROVISIONS REQUIRED BY §276a OF THE ACT, WHEN—BECAUSE THERE ARE NO CONTRACT AMOUNTS WITHHELD SUFFICIENT TO ASSURE EMPLOYEE PAYMENTS** (see 40 U.S.C. §276a-2(a)) **NOR IS THERE A SURETY PAYMENT BOND FOR THE PROTECTION OF EMPLOYEES** (see 40 U.S.C. §276a-2(b))**—SUCH EMPLOYEE RIGHT OF ACTION IS THE ONLY REMEDY AVAILABLE TO MAKE EFFECTIVE THE CONGRESSIONAL PURPOSE OF THE DAVIS-BACON ACT TO REQUIRE CONTRACTORS TO PAY THEIR EMPLOYEES THE WAGES REQUIRED BY THE ACT.**

A. The "right of action" question was not raised, briefed, argued or ruled on in the proceedings below which have been brought here for review. Should the Supreme Court elect, nevertheless, to consider this question, it must be presumed that the courts below

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[20] (Continued)
1962, on *"Administration of the Davis-Bacon Act,"* at 822: "No attempt was made by Congress in 1931, 1932 or 1935 to formulate definitions for the terms 'construction, alteration and/or repair,' or the terms 'public buildings and public works.' It thus seems clear that Congress intended no specialized meaning for this language. * * * The terms 'construction, 'prosecution,' 'completion,' and 'repair' have also been defined by the regulations to incorporate the generally accepted, practical meaning of these words as intended by Congress * * *." And, of course, our courts have no difficulty in applying statutory language to the facts. See, *e.g., U.S. (Hillsdale Rock Co., Inc.)* v. *Cortelyou & Cole, Inc.,* 581 F.2d 239, 243 (9th Cir. 1978), where the Ninth Circuit agreed with the district court that "Hillsdale's efforts were involved in the 'construction, alteration, or repair of any public building or public work of the United States' ".

> **have found and concluded** (as in *McDaniel v. University of Chicago,* 7 Cir., 512 F.2d 583 and 548 F.2d 689, certiorari denied 434 U.S. 1033) **that such employee right of action is the only remedy available to make effective the congressional purpose to require contractors to pay their employees the wages required by the Act.**

Respondents have heretofore, in our "Brief in Opposition to Petition for Certiorari (at 26-29) and in paragraphs 6-7 of the "Statement of the Case" in our instant brief (at 5-8), sufficiently delineated the factual and procedural posture of this cause at the time it was brought here for review. There was **no** question in the courts below on the summary judgment which the Seventh Circuit reviewed and reversed (*Coutu* v. *Universities Research Association, Inc.,* 7 Cir., 595 F.2d 396-402; J.A 35-46) concerning the existence of an employee right of action. The closest petitioner ever got to that question, and only then with respect to the "contract" issue (Point I in this brief) rather than to any "right of action" issue was petitioner's assertion that "Plaintiff Failed To Exhaust Administrative Remedies" (Deft. Brief, 7th Cir. Docket No. 78-1165, at 14-16).

Further, our respondents assert in this case that their right of action exists under circumstances which render other statutory relief unavailable. Thus it must be presumed (as the lower courts doubtless would have found if the "right of action" issue had been raised below) that there are no amounts withheld by the government from which respondents might be paid, *see* 40 U.S.C. §276a-2(a), and that petitioner has not submitted a surety payment bond on which respondents might sue to recover unpaid wages, *see* 40 U.S.C. §276a-2(b).

The argument under this point II, therefore, is presented in the event this Court elects to consider the "right of action" question.

B. There is a private right of action for back wages against a contractor in favor of employees who have performed Davis-Bacon Act work under a contract procuring Davis-Bacon Act work of "construction, alteration and/or repair, including painting and decorating, of public buildings or public works of the United States". There is no administrative determination that this contract is not covered by the Act, nor does the right of action here asserted require any such determination.

1. The Davis-Bacon Act governs concerning this contract. Both petitioner and the United States as *amicus* concede that the right of action **does** exist if the Davis-Bacon Act "obligation was assumed or * * * contemplated by the contracting parties" (Petr. Brief, at 30), or if the suit concerns "a contract that contains Davis-Bacon stipulations" (*Amicus* Brief, at 17, n. 14), and that "An employee should also be able to recover in a contract action if Davis-Bacon Act stipulations are inadvertently omitted from a contract [since] the Davis-Bacon stipulations would be deemed to be incorporated by operation of law" (*Ibid.*)[21] The instant suit satisfies those descriptions of employee private suits which even petitioner and the United States agree are proper.

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[21] *Amicus,* suggests that the "incorporation by operation of law" doctrine described in the *Christian* opinions, 312 F.2d 418 (Ct. Cl.), rehearing denied, 320 F.2d 345, cert. denied, 375 U.S. 954 (1963), requires that "the contracting agency concedes that the omission was erroneous" (*Amicus* Brief, at 17, n.14). No such requirement for a government agency concession is present in the *Christian* case or in the other authorities which deal with the doctrine.

Respondents have hereinbefore summarized the facts which show that the instant government contract **is** covered by the Davis-Bacon Act and that the contracting agency (AEC/ERDA/DOE) **does** view it as covered. Statement of the Case, at 3-4. The facts are also clear that to the extent that the petitioner contractor-employer uses its own employees for Davis-Bacon Act work, the agency views that work as covered. *Ibid.* Petitioner and *amicus,* however, without pointing to any governmental ruling or decision characterizing the contract as not covered by the Act, make that non-existent ruling the *sine qua non* and the essence of their position. (See, *e.g.,* Petr. Brief at 2, *Amicus* Brief at 1, 17). Respondent and the respondent class do *not,* however, assert the existence of any "erroneous coverage determination", and their right of action does not depend upon the assertion or existence of administrative error.

Whatever may be the reason—and whether that reason involves administrative or contractor individual or collaborative error, disregard, neglect or intent—the express statutory requirements provided in the Davis-Bacon Act as means by which respondent wage-earners might recover their unpaid minimum wages have not been implemented. The contracting agency did not withhold funds from the petitioner, *see* 40 U.S.C. §276a, and the petitioner did not submit a surety payment bond, *see* 40 U.S.C. §276a-2(b). In addition the agency did not invoke available sanctions of termination, *see* 40 U.S.C. §276a-1, and the Comptroller General did not invoke the available blacklisting procedure, *see* 40 U.S.C. §276a-2(a).

2. This right of action is predicated on Davis-Bacon Act rights. The Davis-Bacon Act manifestly confers a private right of action upon wage-earners. Congress in-

tended it and the Act refers to it. Petitioner, however, would have that suit limited only to situations where the government contract contains explicit and complete contract clauses detailing all a contractor's Davis-Bacon Act duties. The United States, on the other hand, approves suit "if Davis-Bacon Act stipulations are inadvertently omitted from a contract" (*Amicus* Brief, at 17, n.14), but would have that suit limited only to situations where the contracting agency concedes that the omission was inadvertent. Neither limitation is proper nor required by the Act, by administrative functions assigned by the Act, or by concerns for economy.

Neither the United States nor this Court need be concerned about the costs involved in complying with Davis-Bacon nor the extent of private litigation to be anticipated. At least as late as 1962, it was made clear by the Deputy General Counsel of the Office of the Comptroller General and the Chairman of the House Subcommittee on Labor, that very few enforcement attempts—governmental or private—had been made by any procedures whatever[22]; and by the then Solicitor of Labor that even employee wage suits on the required payment bounds have "not been effective in the past; it has not been used. It exists under the Davis-Bacon Act, but it has not been used under the Davis Bacon Act." H.R. Hearings, 1962, at 902. And so far as costs are concerned, the Solicitor's prepared statement submitted to the Subcommittee on Labor of the Committee on Education and Labor of the House of Representatives, contained a section entitled "Does the Davis-Bacon Act Inflate Federal Construction Costs", answered "no" to that question, summarized the evidence for that conclusion, and restated

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[22] H.R. Hearings, 1962, on "Administration of the Davis-Bacon Act", 87th Cong., 2d Sess., at 301-302.

the congressional policy decision upon which the Act is based. (H.R. Hearings, 1962, at 818-819.)[23]

Thus we come to one of the few suits ever filed under the Davis-Bacon Act—the suit which **did** deal directly with the right of wage-earners to sue their contractor-employer when there is no payment bond available—*McDaniel* v. *University of Chicago,* 512 F.2d 583 (7th Cir. 1975), reaffirmed on remand, 548 F.2d 689 (7th Cir. 1977), certiorari denied, 434 U.S. 1033 (1978). There the right of action upon which in the instant case, too, respondents rely, was discussed. In *McDaniel I,* the Seventh Circuit held that since the employees had available to them neither direct payment by the government out of amounts withheld, nor an action against their employer and its surety on a surety payment bond, the employee suit against their contractor-employer alone was required and "consistent with the congressional purpose in the Davis-Bacon Act". *See* 512 F.2d at 585, 587.

In *McDaniel II,* after remand by this Court "for further consideration in light of *Securities Investor Protection Corp.* v. *Barbour,* 421 U.S. 412 (1975) and *Cort* v. *Ash,* 422 U.S. 66 (1975)", 423 U.S. 809 (1975), the Seventh Circuit reaffirmed *McDaniel I.* In the course of its second opinion, the court in *McDaniel II* dealt at length, *inter alia,* with the two factors which petitioner and *amicus* now claim as the basis for denying the right of our respondents to whatever remedy remains under the Davis-Bacon Act after agency and contractor non-compliance with the withholding and bonding requirements es-

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[23] See also the Solicitor's testimony that "Congress has not injected a cost factor into the Davis-Bacon Act as one of the standards to be used in determining which wage rates will apply" (H.R. Hearings, 1962, at 153), and earlier like testimony of then Secretary of Labor Arthur J. Goldberg (*id.*, at 47, 49, 53, 55)).

tablished by law.[24] In *McDaniel II*, the court considered all factors in light of this Court's opinions in *Cort* and *Securities Investor*, and disagreed directly and emphatically with assertions now again made by petitioner and *amicus*. Thus the Seventh Circuit held, *inter alia*, (a) that far from there being any congressional intent to deny this remedy, Congress intended it, (b) that Congress later also recognized "that laborers have rights of action under the contractual provisions required by 40 U.S.C. §276a," (c) that Congress also recognized that "laborers are able to sue at least as third-party beneficiaries of the contract required by 40 U.S.C. §276a," (d) that "Davis-Bacon Act contemplates by its terms some private enforcement" and "a private action," and that "the policy * * *, private suit, is not really in question," and (e) that because the other remedies based on withholding of contractor payments and the submission of a surety payment bond were "ineffective" this "private right of action in the Davis-Bacon Act is necessary to effectuate the intention of Congress in passing the statute". *See* 548 F.2d at 694-695.

3. Congress has approved, not disapproved, the private right. *Amicus* claims that Congress rejected employee wage suits because it rejected Congressman Goodell's amendment which would have allowed "judicial review" (*Amicus* Brief, at 24-25). The amendment was introduced for the purpose of permitting judicial review of the Secretary of Labor's prevailing wage determina-

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[24] The two factors asserted in defense of the existence of an employee private suit, are "strong evidence of congressional intent to deny any remedy other than the enforcement provisions expressly contained in the Davis-Bacon Act" (see *amicus* brief, at 23; petr. brief, at 31); and "It would also be inconsistent with the legislative scheme to imply a private enforcement remedy" (see *amicus* brief, at 30; petr. brief, at 31).

tions.[25] In the case at bar, as in *McDaniel,* the wage-earners *rely* on the Secretary's wage determinations, and simply seek in this suit to recover what they are due by reason of those determined wage rates.

Amicus also claims that Congress did not know what it was doing when it enacted the Portal-to-Portal Act limitations provisions concerning suits (including class actions) under the Davis-Bacon Act. (*Amicus* Brief, at 24-29). Plainly, however, Congress knew what it was about. Much of the debate in 1947 related to the advisability and propriety of including the Davis-Bacon Act and the Walsh-Healey Public Contracts Act, along with the Fair Labor Standards Act, in the 1947 legislation.[26] Congress also knew what it was doing when it rejected S. 70, a bill similar to H.R. 2157, but which contained no reference whatever to the Davis-Bacon Act or to the Walsh-Healey Public Contracts Act. *Cf.* S. Report No. 37 (80th Cong., 1st Sess.) concerning S. 70.[27]

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[25] See, e.g., Congressman Fogarty's statement, 110 Cong Rec. 1201 (1964).

[26] In addition to at least 70 separate references to the Davis-Bacon Act in the Senate debates (93 Cong. Rec. 2081-2098, 2110-2135, 2175, 2192-2198, 2230-2277, 2287-2311, 2348-2377, 4371-4372 (1947)), and over 20 separate references to the Davis-Bacon Act in the House debates (93 Cong. Rec. 1488-1517, 1556-1574, 4383-4391 (1947)), there are like references in the lengthy S. Report No. 48, in H.R. Report No. 71, and in the Conference Report (H.R. Report No. 326, 80th Cong., 1st Sess.), on H.R. 2157 which became the Portal-to-Portal Pay Act of 1947.

[27] Further, *amicus'* assertion that "reference in 29 U.S.C. 255 to the Walsh-Healey and Davis-Bacon Acts was itself an afterthought" reflects just what vocal opponents of the Portal-to-Portal Act argued in seeking to exclude the Davis--Bacon Act and Davis-Bacon suits from its coverage. See, e.g., S. Report No. 48, "Minority Views," at 2-3. Both the Senate and the House rejected that assertion, and H.R. 2157, as amended in conference, became law.

Amicus forgets that there is *no* limitation provision set forth in the Davis-Bacon Act, 40 U.S.C. §§276a-276a-7. There is a one-year provision for suits under the Miller Act, 40 U.S.C. §§270a-270e, concerning "Every suit instituted under this section" [§270b(b)]. Suits instituted under the Davis-Bacon Act are not suits instituted under section 270b of the Miller Act. In addition, however, suits arising under the Davis-Bacon Act and predicated on rights established by that Act alone, are expressly subject to the Portal-to-Portal Act two-year (if by willful violation, three-year) limitation provision (29 U.S.C. §255 (a)). Thus the Portal-to-Portal Act not only affirms the existence of a Davis-Bacon Act private action, but clearly excludes the proposition that such right of action is predicated upon or is limited to an action pursuant to the provisions of the Miller Act. Were the right of action indeed so limited, it would have to be barred after one year — not two years (and for willful violation, three years) — to be consistent with the Miller Act and to obviate additional multitudes of legal and practical problems arising out of any presumed conflict between these limitations provisions.

Amicus suggests next that a private right of action in favor of laborers and materialmen "cannot be inferred from the obligations imposed on contractors under [the Miller Act]", so "there is no reason to infer a similar private right of action in favor of laborers and mechanics from the obligations imposed under [the Davis-Bacon Act]" (*Amicus* Brief, at 29, n. 23). The fact that the one statute is not the other, and the differences in the purposes and history of them both, are reason enough. But in addition, the basic premise of *amicus* is incorrect, for

> **"Where the general contractor fails to furnish such a bond, the laborers and materialmen * * * may sue the general contractor and recover from him.** *Strong* v. *American Fence Const. Co.*, 245 N.Y. 48" (*Seaboard*

Surety Co. v. *Standard Acc. Ins. Co.*, 277 N.Y. 429 (1938); emphasis supplied).

Thus, the prime authority quoted by *amicus* for its proposition is noted as *authorizing* and not rejecting a private remedy for an intended beneficiary when there is no contractor's bond. And as to the remaining cases cited (*Amicus* Brief, at 28-29), *none* of them stand for the proposition asserted.

Finally, *amicus* suggests that it "would be inconsistent with the legislative scheme" (*Amicus Brief,* at 30-35) to permit these wage-earners a remedy for the deprivation of their wages earned under and assured to them by the Davis-Bacon Act. There is no inconsistency. We have already pointed to the evidence establishing that this suit does not affect administrative functions under the Davis-Bacon Act, that there are no administrative procedures available to employees for adjudication and vindication of their Davis-Bacon Act rights, and, indeed, that "Nobody is given the authority to make the final determination" (Resp. Brief, at 38). In these circumstances, then, *to refuse* respondents a remedy when Congress has so clearly intended that they be paid for their labor the amounts to which the Act entitles them by right, would amount to action patently inconsistent with the legislative scheme. And that deprivation would not alone be contrary to the legislative purpose and scheme; it would conflict with basic Fifth Amendment due process rights. See *United States ex rel. Von Hoffman* v. *City of Quincy,* 71 U.S. 403, 410 ("A right without a remedy is as if it were not. For every beneficial purpose it may be said not to exist. * * * A different result would leave nothing * * * but an abstract right—of no practical value—and render the protection of the Constitution a shadow and a delusion.")

Notwithstanding the general and conclusory assertions by petitioner and *amicus* concerning the effect upon re-

spondents' cause of this Court's recent "private right of action" trilogy (see Petr. Brief, at 30-31; *Amicus* Brief, at 19-20, 34), it is clear that this private suit satisfies all the appropriate criteria. Thus, for example,

(1) this being a situation "in which it is clear that federal law has granted a class of persons certain rights," the remedy exists unless it is shown that Congress had "an explicit purpose to deny such cause of action." *Cannon* v. *University of Chicago,* 99 S.Ct. 1946, 1956 (1979);

(2) the remedy being "necessary or at least helpful to the accomplishment of the statutory purpose, the Court is decidedly receptive to its implication under the statute." *Cannon, id.,* at 1961;

(3) the fact that other provisions of the Davis-Bacon Act (*see, e.g.,* 40 U.S.C. §276a—2) "create express remedies [is not acceptable] as a sufficient reason for refusing to imply an otherwise appropriate remedy under a separate section" (*see* 40 U.S.C. §276a). *Cannon, id.,* at 1965;

(4) to the extent that Congress may be said to have failed "expressly to consider [this] private remedy is not inevitably inconsistent with an intent on its part to make [this] remedy available" for this intent appears "implicitly in the language or structure of the statute, or in the circumstances of its enactment." *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* 100 S.Ct. 242, 246 (1979).

(5) since the statute declares and creates certain employee rights, the statute "by its terms necessarily contemplates that the issue of [those rights] under its criteria may be litigated somewhere." *Transamerica, ibid.*

(6) the fact that employees were intended by Congress as the especial beneficiaries of the minimum wage rates required to be paid them under the Davis-Bacon Act, "strongly suggests that Congress was [not] unwilling to impose * * * potential monetary liability to a private suitor". *Transamerica, id.,* at 248.

(7) this being a situation in which "the statute in question * * * prohibited certain conduct or created federal rights in favor of private parties," it falls within the class of those cases in which implied private remedies exist. *Touche Ross & Co.* v. *Redington,* 99 S.Ct. 2479, 2485 (1979).

(8) this is a situation "where congressional purposes are likely to be undermined absent private enforcement" and the private remedy is sought by "the particular class intended to be protected by the statute". *Piper* v. *Chris-Craft Industries, Inc.,* 430 U.S. 1, 25, 97 S.Ct. 926, 941 (1977). Plainly, since a purpose of "conferring a right of action on employees to recover from the contractor" (*United States* v. *Binghamton,* 347 U.S. 171, 176 (1954) is expressed in the statute itself, the private remedy serves "rationally to complement its remedial scheme" (see *Whirlpool Corp.* v. *Marshall,* 100 S.Ct. 883, 891 (1980)).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

HUGH B. ARNOLD
DANIEL N. KADJAN
ARNOLD AND KADJAN
11 South LaSalle Street
Chicago, Illinois 60603
(312) 236-0415

ROBERT JAY NYE
NYE AND NYE
420 North Euclid Avenue
Oak Park, Illinois 60302
(312) 386-7373

Attorneys for Respondent Stanley E. Coutu, and the Respondent Class.

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APPENDIX

Portions of opinion of the Court of Appeals for the Seventh Circuit, in Coutu v. Universities Research Association, Inc., 595 F.2d 396 (J.A. 35-46):

"This action was brought by plaintiff, an electronics technician, and his class seeking $5,000,000 in damages and other relief on the ground that defendant did not pay them the prevailing wages required by the Davis-Bacon Act (40 U.S.C. §276 *et seq.*) for their construction work. Defendant is a not-for-profit consortium of universities formed to facilitate scientific research and to design, construct and operate the Fermi National Accelerator Laboratory in Batavia, Illinois. This facility is a 6800-acre Kane County site containing laboratories, research offices, related facilities, and the world's largest proton accelerator system. It is used to carry out research in the field of high-energy physics by numerous scientists from institutions located throughout the world. (App. 50 n. 3.) The Davis-Bacon Act requires government construction contracts to contain a provision stating that the minimum wages to be paid various classes of laborers and mechanics shall be based upon the wages to be determined by the Secretary of Labor to be prevailing where the work is to be performed. 40 U.S.C. §276a(a). * * *.

"Plaintiff and his class alleged in their 'First Cause of Action' (hereinafter 'Count I') that defendant violated the Davis-Bacon Act by not paying members of plaintiff's class the minimum wages 'required to be paid pursuant to the said contract and the prevailing wage determinations of the Secretary of Labor and the Davis-Bacon Act' (App. 2). Count I was dismissed in an unreported October 8, 1975,

memorandum opinion and order of [a district judge]. However, that order did not dismiss the remaining six Counts of the complaint.

"On August 10, 1976, [another district judge] to whom the class action had been transferred, certified the plaintiff class. Discovery was apparently stayed in February 1977. In March 1977, defendant filed a motion for summary judgment. In November 1977, [the district judge] handed down a memorandum order granting that motion. The court noted that in Count II the plaintiff class alleged that the contract fell within the purview of the Davis-Bacon Act and that the contract by its terms provides for 'payment to members of plaintiff class at the legal wage rate applicable to work actually performed.' * * * The court then held that the contract failed to contain the 'requisite Davis-Bacon Act specifications for maintenance of the claims stated in Count III' and accordingly dismissed that Count. Counts III through VII of the complaint were based on state claims, and the district court declined to assert pendent jurisdiction over them 'due to the legally insubstantial nature of the federal claims.' Therefore, the complaint was dismissed in its entirety.

"* * * [I]n dismissing Count I [the first district judge] held only that if the contract was not a Davis-Bacon Act contract plaintiff could not recover. Clearly if a contract contains the required wage stipulations, this would show that it was a Davis-Bacon Act contract. [That district judge] apparently recognized, however, and we agree, that clauses in the contract other than the wage stipulations may reveal that the contract was one for Davis-Bacon Act work (App. 25).

"Thus two theories of recovery remained open to the plaintiff class after [the first district judge's] dismissal: (1) there may have been Davis-Bacon Act stipulations in the contract or (2) there may have

been other evidence that the contract was one for Davis-Bacon Act work, in which case the required stipulations arguably become a part of the contract by operation of law. [The second district judge's] grant of summary judgment was based on the affidavit (n. 4 supra) tending to disprove only the first of these two theories. We hold that summary judgment was improperly entered against plaintiff and his class because the required wage stipulations were incorporated by operation of law.

"The Davis-Bacon Act Applies to Construction, Alteration or Repair Work Performed by Defendant

"The key provision in the contract between defendant and the United States Government acting through ERDA is Article XXXIII which provides in pertinent part as follows:

> 'This contract does not contemplate the performance of work by the Association, with its own employees, which the Commission determines is subject to the Davis-Bacon Act. Such work, if any, performed under this contract shall be procured by subcontracts which shall be subject to the written approval of the Commission and contain the provisions relative to labor and wages required by law to be included in contracts for the construction, alteration and/or repair, including painting and decorating, of a public building or public work.'

In this lawsuit, plaintiff contends that defendant's own employees performed and are performing construction, alteration and repair work at the Fermi Laboratory, so that the Davis-Bacon Act wage provisions are applicable to the work done by plaintiff and his class. We agree that if the defendant actually performed such work with its own employees at the

Fermi Laboratory, they became entitled to the prevailing wages in Kane County where the work was to be performed. * * *

"Indeed, in a January 23, 1973 [sic. 1968], letter from the Atomic Energy Commission's Chicago Operations Office Manager to the president of the defendant, both these parties foresaw that conditions might arise which might make it necessary for the defendant to perform Davis-Bacon Act work and in such instance to modify the contract to incorporate the Davis-Bacon Act provisions relative to labor and wages. Since under *McDaniel I* the contract was already so modified by operation of law, amendments to the cotnract were not needed to accomplish that result.

"* * * Because the provision to pay the prevailing wage rate was incorporated by operation of law, the affidavit relied upon by the district court to the effect that no Davis-Bacon Act 'stipulations requiring the payment of prevailing wages have ever been made a part of or incorporated in' the contract (see n. 4 supra) is insufficient to support the grant of summary judgment. * * *

"It is uncontested that the Secretary of Labor has published general wage determinations in decisions published in the Federal Register that are applicable to labor on government projects in Kane County, Illinois, where the Fermi Laboratory is located and where the defendant's alleged construction activity has been performed. Therefore the district court was mistaken in concluding that to sustain plaintiff's position would require it to make wage determinations for the parties.

"Exhaustion of Administrative Remedies Is Not Required

"If defendant or our own research had uncovered administrative regulations affording plaintiff and his class relief in this situaton, we might require recourse to that remedy before permitting this lawsuit to proceed. The Davis-Bacon Act itself does not contain a provision requiring exhaustion of administrative remedies in this kind of case. Moreover, we rejected such an argument in the second *McDaniel* case where the University of Chicago had argued that administrative procedures afforded adequate relief to the individual employees of a government contractor. * * * As the Government itself recognized in *McDaniel II.*

> 'Neither the statute nor the regulations promulgated thereunder provide any administrative remedy in favor of an employee who has been injured by the failure to include the prevailing-wage provisions in a contract.' (Solicitor General's *amicus curiae* brief opposing the petition for a writ of certiorari in *University of Chicago and Argonne* v. *McDaniel,* 434 U.S. 1033, at 25, n. 20.)

"* * * Plaintiff must now be permitted to resume discovery (or employ other suitable means) to determine whether defendant used plaintiff and his class to perform construction, alteration or repair work at the Fermi Laboratory. If so, under the Davis-Bacon Act they will be entitled to recover wages that the Secretary of Labor has determined to be prevailing for the corresponding classes of laborers and mechanics employed on similar projects in Kane County, Illinois. Since the district court had jurisdiction over Count II, it also had pendent jurisdiction to decide state claims presented in Counts III-VII."

Supreme Court, U. S.
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No. 78-1945

In the
Supreme Court of the United States
October Term, 1978

UNIVERSITIES RESEARCH ASSOCIATION, INC.,
Petitioner,

vs.

STANLEY E. COUTU, *et al.*,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

REPLY BRIEF OF PETITIONER

Robert E. Mann
Attorney for Petitioner Universities Research Association, Inc.

Seyfarth, Shaw, Fairweather & Geraldson
55 East Monroe Street
Chicago, Illinois 60603
(312) 346-8000
Of Counsel

The Scheffer Press, Inc.—(312) 263-6850

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REPLY BRIEF OF PETITIONER

I.

Congress Did Not Vest Federal Courts With Jurisdiction To Alter Existing Contracts By Making Post-Contracting, and De Novo Davis-Bacon Act Coverage And Classification Determinations.

A. Posture of the Case

This lawsuit is between a former electronics technician employee[1] of Petitioner URA[2] relative to work he per-

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[1] The District Court granted class action certification authorizing Respondent-Plaintiff Coutu to represent an alleged class of "mechanics and laborers" (see relevant docket entry of 8/4/76 (App. 1)). The Portal-to-Portal Pay Act, 29 U.S.C. § 256, requires that individuals file written consents to toll the applicable limitations period. To date, only Mr. Coutu has filed such a consent.

formed, pursuant to a contract between URA and the federal government, at the Fermi National Accelerator Laboratory (App. 3-12). He contends that his electronics technician work was "construction" work within the meaning of the Davis-Bacon Act and, therefore, that he was entitled to receive wages computed with respect to rates prevailing for construction workers in the area where the work was performed.[3] The suit was dismissed by the District Court upon an unrebutted showing that no administrative determination had been made holding Respondent's work to have been thus subject to the Act. The Court held it did not have jurisdiction to make a *de novo* or original determination relative to Davis-Bacon Act application and/or to judicially amend the underlying federal contract to provide the requested prevailing rate stipulations, upon suit by a private party (App. pp. 20-34).

The Court of Appeals reversed, holding that the Davis-Bacon Act was incorporated by law into the applicable

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[2] Universities Research Association, Inc., a not-for-profit incorporated consortium of North American universities under contract to the United States through its Department of Energy (formerly through the Energy Research Development Administration (ERDA) and the Atomic Energy Commission AEC)). As in our principal brief, references to the contracting agency will be made herein as "AEC/ERDA", to the Petitioner as "URA", to the project site as "Fermilab" and to the contract as "the contract". References to the Joint Appendix will be made as (App. p. 6).

[3] The Respondent apparently does not base his claim upon rates prevailing for electronics technicians; rather, he claims a right to have been paid at rates prevailing for skilled trades construction electricians. He admits, however, that he has not been certified to work in the latter trade (Coutu dep. ff.).

contract. It held, albeit with considerable equivocation, that the District Court did have jurisdiction to make original or *de novo* coverage and classification determinations under the Act upon suit by a private party directly against the contractor, nothwithstanding the existence or absence of any coverage determination by the contracting agency and despite the fact that the contract pursuant to which Respondent worked included government approved rate schedules applicable to his work (App. pp. 35-46).

B. Respondent's Inability to Defend His Position in Light of the Act and the Administrative Framework of the Act

The principal argument advanced in support of Respondent's suit asserts that the Davis-Bacon Act requirment for payment of prevailing rates is unequivocally mandatory irrespective of agency action or contract terms; therefore, so the argument goes, since *one* purpose of this contract was to facilitate construction of Fermilab—a public work—the Davis-Bacon Act was embodied in the contract by operation of law, and anyone performing work in connection with the project automatically became entiled to prevailing wage rate treatment by right enforceable in a private action before the Federal Courts.

URA does not disagree that facilitation of construction was *one* purpose of the contract; URA's role to that end was to supervise and administer such construction, drawing on its member institutions' scientific expertise to ensure that this highly sophisticated laboratory was properly constructed to meet the demands of research efforts to be conducted there. Granting, therefore, that one purpose of the contract was to facilitate a federal construction

project, the contract had other purposes as well: *e.g.*, the post-construction administration, operation and use of Fermilab. Respondent points out that the original URA-AEC contract did not reference "administration, operation and use" (Brief for Respondents, pp. 2-3). As he admits, however, the contract was reissued effective April 6, 1972, and the reissued contract did then provide for discharge of those responsibilities by URA. *Ibid.* In this connection, it should be noted that the instant suit was filed in 1975, three years after reissuance of the contract, and is based upon the Respondent's work activities performed during his period of employment from September 25, 1972 to September 10, 1975, in the capacity of electronics technician assigned to supervise and monitor accelerator operations (Coutu dep., ff.).

URA was authorized to employ at government expense the personnel necessary to carry out its responsibilities. The contract provides what such persons—including electronics technicians—are to be paid (App. pp. 54-61).[4] Therefore, even if Respondent's "incorporation by law" theory were found to have any merit, the argument simply does not go far enough. It fails to deal with the central question whether the Congress conferred upon the courts

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[4] URA is a not-for-profit entity and uses government funds exclusively to carry out its responsibilities under the contract. The Appendix material cited includes relevant portions of the contract respecting the limits of URA's authority to compensate employees with such funds, including the schedule of rates applicable to employees paid a weekly salary (including electronics technicians) and the hourly rate schedule applicable to skilled instrument makers, machinists and welders who work in the laboratory machine shops and are represented by a craft union. (App. p. 61)

jurisdiction to determine, in the context of a post-contract action against a contractor, that particular work activities constituted "construction" as opposed to "administration, operation, and use" of the facility. Respondent contends, apparently, that the federal court had such jurisdiction without regard to determinations made by the agencies but cannot cite any convincing authority to that effect.

We respectfully submit that there is no such authority because it is clear that there is no jurisdiction in the federal courts to determine which work is or is not subject to prevailing rate requirements in the circumstances presented by this case. *North Georgia Building and Construction Trades Council* v. *Goldschmidt et al.*, ... F.2d ....., 27 CCF ¶ 80,567 (5th Cir., July 10, 1980), cited by *Amicus* AFL-CIO at pp. 4, 17 of its brief, held that *pre*-contracting Davis-Bacon Act classification decisions by the federal agencies are subject to judicial review under the Administrative Procedure Act in actions brought against the agencies. As *Amicus AFL-CIO* points out in the text accompanying its citation of *North Georgia,* however, a pre-contracting right of action under the APA to challenge an agency determination is a far different circumstance than that presented here: *i.e.,* a *post*-contracting action against a private contractor who, as must be conceded, is not even alleged to be in violation of his contract.

It should be noted, in this context, that the Court deciding the *North Georgia* case soon thereafter issued a decision holding that the Davis-Bacon Act afforded no private right of action by an employee against his contractor-employer. *United States, et al.* v. *Capelletti Brothers, Inc., et al.*, ... F.2d ..... (5th Cir. #78-2031, July 23, 1980). In so holding, the Fifth Circuit expressly re-

jected the contrary holding of the Seventh Circuit in *McDaniel* v. *University of Chicago,* 548 F.2d 689 (7th Cir. 1977), *cert. denied,* 438 U.S. 1033, 98 Sup. Ct. 765 (1978), the case upon which the Seventh Circuit premised its decision in this case.

Many policy and legal considerations militate against endorsement of Respondent's theory regarding the crucial question as to the locus of jurisdiction to determine what work activities are or are not subject to Davis-Bacon Act prevailing rate requirements and the time when such determination must be made in order to obligate a private contractor.

Thus, it must be recognized that what Respondents urge here is that *any* employee of a government contractor has the right, at *any* time pre, during, or post contracting, to apply for a District Court determination that his or her work is "construction" work and that he is entitled to a prevailing rate wage. Obviously, however, no businessman or, as here, not-for-profit entity, will be encouraged to contract with the government if, in so doing, he or it risks such *post-* contracting litigation and/or liabilities, based upon applicability of this particular Act. As *Amicus* United States points out, endorsement of the Respondent's theory in this case would completely destabilize and confuse government contracting, so much of which relies on employment of individuals working in a vast number of occupations.

Endorsement of Respondent's theory that the Act operates independently of any administrative framework for pre-contract determinations also would have to ignore at least two significant historical expressions of a Congressional policy to the contrary.

First is the history surrounding the 1935 amendments to the Act, requiring pre-contract resolution of coverage disputes in order to avoid post-contract litigation and uncertainty. As Respondent points out, the original Act fostered much controversy over who was covered and what rates were applicable (Brief for Respondents, pp. 31-34). To stem that controversy and restore order to the government contracting processes, Congress amended the Act to vest essentially final jurisdiction in the Department of Labor to make coverage and classification determinations. We submit, respectfully, that the choice of Congress to vest the Executive with authority to make such determinations reflects a clear expression of concern that achievement of the socio-economic goals embodied in the Act not be had at the cost of wholesale disruption of federal contracting programs; the policy, in short, sought to achieve a *balance* between efficient contracting and the social objective, not one at the expense of the other.

Second is the 1962-63 Congressional refusal to legislate for any type of judicial intervention in the rate determination processes (see Brief for Petitioner, pp. 15-20). As discussed in our principal brief, the events in Congress during 1962-63 hearings on proposed Davis-Bacon Act amendments show that Congress *categorically* rejected the notion that Courts should have any jurisdiction to interfere with the contracting processes. It chose, instead, to rely on the agencies' ability — under supervision of the Labor Department — to carry out congressional policies regarding labor provisions in federal contracts. Whether or not that choice was appropriate is a matter of legislative, not judicial, concern.

The legislative history thus plainly shows that Congress did not intend originally and has never intended to allow

the Federal Courts to disrupt federal contracting programs by assuming the agencies' role therein. Congress clearly adopted a balanced policy designed overall not unreasonably to interfere with federal contracting, or to result in uneven, decentralized decision-making under the Act. Respondent's theory would require that the Court ignore that policy.

Respondent's theory also is contrary to all judicial expression — save that of the Court of Appeals' decision rendered below — rendered since the Act was adopted. The first Appellate-level opinion construing the Act was by the Fifth Circuit, in *Gilloz* v. *Webb,* 99 F.2d 585 (5th Cir. 1938); that Court held that rights provided under the Act hinged upon there first being a pre-contracting determination by the Executive Branch as to coverage and classification of work. *Gilloz* v. *Webb* was endorsed by this Court in *United States* v. *Binghamton Construction Co.,* 347 U.S. 171, 74 Sup. Ct. 438 (1954). Respondent cites *Binghamton Construction* for the proposition that the Davis-Bacon Act was adopted solely to benefit workers, not contractors (Brief for Respondent, pp. 11 *et seq.*). The point is not germane here, however, because URA is not arguing that the Act benefits it in the sense urged by the employer in *Binghamton* (Binghamton contended the stipulations required by the Act constituted representations as to the maximum rates to be paid and that it was entitled to extra compensation in relation to excess rates it was required to pay in order to acquire sufficient labor for the job). URA cites *Gilloz* and *Binghamton* as precedent for its position that action by the agencies is *sine qua non* to creation of a right to the minimum wage provisions of the Act, and that the Act does not operate in the absence thereof.

Similarly, in *Endicott Johnson Corp.* v. *Perkins,* 317 U.S. 501, 63 Sup. Ct. 339 (1943), and *Perkins* v. *Lukens Steel Co.,* 310 U.S. 113, 60 Sup. Ct. 869 (1940), this Court held that individual rights based upon federal contract labor statutes depend upon agency action which is not subject to judicial review. Most recently, the Fifth Circuit Court of Appeals, in *United States, et al.* v. *Capelletti Brothers, Inc., et al.,* ..... F.2d ..... (5th Cir. #78-2031, July 23, 1980) held that individual workers claiming to have been misclassified by their employer for purposes of Davis-Bacon Act wage rate treatment must look solely to the Department of Labor for relief. *Cf., North Georgia Building and Construction Trades Council* v. *Goldschmidt, et al.,* ..... F.2d ....., 27 CCF ¶80,567 (5th Cir., July 10, 1980) holding that a pre-contract coverage decision by the Department of Labor Wage Appeals Board was subject to limited judicial review under the Administrative Procedure Act.

Finally, the literal terms of the Act belie Respondent's contention that the various courts would have jurisdiction to make post-contracting determinations as to what work activities are or are not to be considered "construction" under the Act. Section 1 clearly is directed to the contracting agency — not the contractor — wherein it provides that the *bid specifications* (prepared, obviously, by the agency) describe and define prospective obligations stemming from the Act and provides further that contracts *based upon such specifications* contain the Davis-Bacon Act wage stipulations. The obvious intent of that statutory phraseology was to place the obligation for compliance with Congressional policy upon the agency and, in turn, to direct any individual allegedly aggrieved under the statute (contractor or employee) to the agency and/or

the Department of Labor for relief. Such intent was recognized by the Fifth Circuit in *U.S.* v. *Capelletti, supra,* and, with respect to this or comparable legislation, by the Second Circuit in *International Association of Machinists* v. *Hodgson,* 515 F.2d 373 (C.A.D.C. 1975), the Court of Claims in *Nello L. Teer* v. *United States,* 348 F.2d 533, 539-40 (Ct. Cl. 1965), and by this Court in *United States* v. *Joseph A. Holpuch Co.,* 328 U.S. 234, 66 Sup. Ct. 1000 (1946) (holding the courts have no jurisdiction to alter federal contracts).

The Respondent simply has not shown any policy or legal basis for his assertion that the various Federal District Courts have jurisdiction to make *de novo* post-contracting determinations concerning what work activities are or are not covered by the Act. Clearly, Congress chose to vest the authority to make such determinations exclusively in the agencies with right of appeal solely to the Department of Labor. Moreover, Congress clearly intended that whatever jurisdiction or avenue of appeal exists, such must be exercised *prior to contracting.*

Therefore, even if the Respondent were correct that the instant contract somehow incorporated the Davis-Bacon Act by implication of law, the contract must be viewed as having incorporated the Act *in toto,* along with its administrative scheme and the long unchallenged application of its terms. Viewed in such context, it should be clear that Respondent's theory has no merit. The Act literally, and as construed by the courts, agencies, legislative expressions, and consistent practice, does not operate in the absence of *pre contract* administrative action to determine the work activities which shall be deemed covered there-

by. The Act could not operate otherwise without totally destabilizing government contracting.[5]

Therefore, the intent and purpose of the balanced legislative scheme require that challenges to agency action must be addressed to the agency, not to the contractor in a post-contracting setting. *North Georgia, supra; Capelletti Bros., Inc., supra.* Respondent does not explain why he did not address his claim to AEC/ERDA and/or the Department of Labor as did the complaining parties in the *North Georgia,* and *Capelletti* cases and in the other cases cited therein. As noted above, AEC/ERDA supplied all funds for his compensation as well as for the entire project. AEC/ERDA had regulatory authority to administer compliance with the Davis-Bacon Act, see 41 C.F.R. § 9-18.701-52 (Administrative controls and cri-

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[5] Respondent appears to concede that such would be the case if his position were upheld. See Brief for Respondent at pp. 34-35, wherein he argues that federal contracting obviously would be more efficiently conducted in the absence of the Davis-Bacon Act. He fails, however, to show how his claim for post-contracting judicial intervention against a contractor would be consistent with the balance struck by Congress between social objectives and efficient contracting. As Respondent notes, moreover, the history of the Act between the time of its original enactment in 1931 and the 1935 amendments calling for predetermination, was one of confusion and frequent litigation over alleged abuses which Congress sought to eliminate and cure by means of pre-contracting administrative action. Brief for Respondents, pp. 31-34. If Respondent's views are upheld, federal contracting obviously will return to just such a condition as existed in the period described by the Respondent, with the federal courts thrown open to claims by any and all persons associated—however remotely—with federal-funded construction projects suing to receive prevailing rates.

teria for application of the Davis-Bacon Act in operational or maintenance activities), and the Department of Labor, of course, has pervasive authority to administer and enforce compliance with the Act (see Section 276c of the Act — App. p. 52); Reorganization Plan No. 14 of 1950, 5 U.S.C. § 903. The obvious inference to be derived from his silence on this point is that he realized or believed that his claim would be rejected.[6]

II.

URA Has Not Contracted To Compensate Its Own Employees At Rates Prevailing For Construction Trades Except Upon A Prior Agency Authorization

As noted by the Courts below, the contract provided that work which AEC/ERDA determined to be covered by the Act would be subcontracted by URA and that such subcontracts would include the usual Davis-Bacon Act implementory provisions (App. pp. 22, 32, 39, 55); the contract expressly recited, however, that the parties did not contemplate that such work would be performed by URA with its own employees (*Ibid.*). These provisions, coupled with the authorized rate schedules incorporated into the contract and applicable to URA employees including technicians (see App. pp. 54-61), clearly show that AEC/ERDA did not regard the work activities of URA's employees as being Davis-Bacon Act-covered, or authorize URA to pay such employees at prevailing construction trade rates.

While seeming to acknowledge the fact, Respondent points to certain correspondence which passed between

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[6] As noted by *Amicus* AFL-CIO, this case does not present the issue whether agency action is subject to judicial review and we do not, therefore, discuss it.

AEC/ERDA and URA raising the possibility of exceptions to the general understanding. See Brief for Respondents at pp. 17-18; App. pp. 62-63. The District Court also noted the existence of such correspondence and, because of it, refused to dismiss the complaint entirely in ruling on URA's original motion to dismiss; the Court left the case open solely to permit Respondent an opportunity to show, if he could, the existence of AEC/ERDA determination(s) that his work was subject to the requirements of the Act (App. pp. 24-25).[7]

Despite the taking of numerous depositions and invoking extensive Freedom of Information Act inquiry, Respondent was unable to show the existence of any such determination (App. pp. 32-33), or to rebut the affidavit appended to URA's subsequent motion for summary judgment.

It is clear, therefore, that URA has assumed no contract obligation to pay its electronics technicians at skilled

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[7] The District Court stated:

> This correspondence leaves open the possibility of performance of Davis-Bacon Act work by defendant's employees pursuant to proper Davis-Bacon Act determinations with regard to the work to be performed . . .
>
> * * *
>
> "This Court does not thereby seek to review the determinations of the Secretary of Labor or of the contracting agency; rather, the Court gives plaintiff leave to show that the Secretary of Labor through ERDA has made Davis-Bacon determinations with respect to the alleged contract, and that plaintiff and the class have performed such work at defendant's direction, pursuant to the contract."
>
> (App. pp. 24-25; see also the District Court's second opinion at App. p. 31, summarizing the foregoing.)

trade construction electricians rates. To force such obligation upon URA would require that the District Court assume the role of contracting agency, make a post-contracting coverage determination favorable to Respondent, and retroactively amend the contract accordingly. Such actions would be inconsistent with the pre-contract determination principle embedded in the Act, would violate the Separation of Powers doctrine, and would be contrary to all known judicial and administrative precedent. *United States* v. *Joseph A. Holpuch Co., supra; Perkins* v. *Lukens Steel Co., supra; International Association of Machinists* v. *Hodgson,* 515 F.2d 373 (C.A.D.C. 1975); *Gilloz* v. *Webb, supra.*

III.

Respondent Has Failed To Show The Existence Of A Private Right Of Action To Establish Prevailing Wage Rate Contract Obligations

A. Procedural Considerations

The Respondent argues that the question of a private right of action was not raised in the Court of Appeals, and, therefore, should not now be considered. However, Respondent made the same argument to this Court in opposing the Petition for Certiorari. This Court nevertheless granted the Petition, following receipt of the Brief for the United States as *Amicus Curiae* in which the Solicitor General pointed out that the question obviously is central to the controversy. Brief for the United States at fn. 7.

Moreover, Respondent's contention is belied by the very posture of this case. In 1977, the Court below rendered its decision in *McDaniel* v. *University of Chicago, supra.* In that decision, the Court of Appeals declared, in ruling

on a motion to dismiss, the existence of a private right of action to enforce an alleged *express* contract commitment to pay prevailing rates. 512 F.2d at 588, and on remand, 584 F.2d 692. Because the right of action recognized by the Court of Appeals in *McDaniel* was predicated upon the alleged existence of an *express* contract to pay the claimed rates, the United States, in connection with the Petition for Certiorari filed in that case, urged that *McDaniel* was not appropriate for review since, if the central allegation of express contract proved untrue, the case would be dismissable in any event. Brief of United States as *Amicus Curiae* in *McDaniel* v. *University of Chicago, supra* (U.S. Supreme Court case no. 76-1764), at pp. 30-31; Brief of the United States as *Amicus Curiae* in this case, at pp. 10-12.

In accord with such considerations, it was argued to the Court below, in part, that since its recognition of a right of action in *McDaniel* was predicated upon the assumption that there existed an *express* contract obligation to pay Davis-Bacon Act-contemplated prevailing rates, the District Court properly dismissed the instant case when no such express contract obligation could be shown *Coutu, et al.* v. *Universities Research Association, Inc.*, Brief of Defendant-Appellee [URA], at pp. 8-10.

The Court, however, substantially and qualitatively extended the *McDaniel* holding in this case. It ruled not only that Congress gave the federal courts jurisdiction to enforce an existing, predetermined and express obligation to pay Davis-Bacon Act rates; the court below held that Congress conferred jurisdiction in the courts to *create and retroactively enforce new obligations after a contract has been performed,* based upon it's own perception of coverage and classification of work. When the in-

stant Petition for Certiorari and the United States' position is viewed in the context of this case, therefore, it is obvious that Respondent's assertion that the jurisdiction (or right of action) issue was never raised is misleading and should be rejected.

B. The Absence of a Congressional Intent to Create a Private Right of Action to Enforce the Act

Respondent argues simply that Congress intended the Davis-Bacon Act to be self-enforcing without regard to and/or apart from its administrative framework; to deny an employee the oportunity to seek an original/*de novo* judicial determination that his completed work activities were covered by the Act would undermine Congress' social policies, argues Respondent (Brief for Respondents, at pp. 48-50, citing *Cannon* v. *University of Chicago,* 441 U.S. 677, 99 Sup. Ct. 1946 (1979).

Respondent's reliance on *Cannon* is obviously misplaced, however, because the statutory scheme addressed there was described by Congress unequivocally in terms of protections conferred upon certain individuals. Conversely, Congress described its policy regarding prevailing rates in terms directed at the contracting agencies; the rights and protections afforded employees by that Act are derivative of and conditioned by, agency action. *Cf., Cannon* v. *University of Chicago, supra,* 441 U.S. at 693, 99 Sup. Ct. at 1955; *U.S.* v. *Capelletti Brothers, Inc., supra,* at part II.1 of the Court's opinion. As we argued above and in our principal brief, the legislative history of the Act leads inexorably to the conclusion that Congress' original desire that locally prevailing rates be paid for work on federal construction projects was tempered by its 1935 amendments to the Act. Those

amendments required that the prevailing rate policy be implemented by *pre-contract* administrative determinations in order to avoid post-contracting disruptions of federal projects. The Fifth Circuit recently recognized in *U.S.* v. *Capalletti Brothers, Inc., supra,* that the Act focuses on the duty of the contracting agencies properly to carry out the congressional policy that federal projects not undermine local labor markets, as opposed to an unequivocal right in individuals to receive particular wage rates. Under the scheme of the Act, the latter clearly is derivative of, and conditioned upon, the former; the Act simply does not operate—at least as against a private contractor—in the absence of an agency predetermination as to its aplicability to the particular work activity in question.

Thus, apropos the tests applied by this Court to ascertain whether Congress intended to create private rights of action in order to further legislative policy, cf. *Cort* v. *Ash,* 422 U.S. 66, 95 Sup. Ct. 2080 (1975), while the employee is *a* beneficiary of the Davis-Bacon Act, the employee cannot reasonably be said to be an *especial* beneficiary to the extent urged by Respondents—*i.e.,* so much an "especial beneficiary" that the interests of the government and of contractors in avoiding post-contract disruptions must be ignored. Clearly, by its 1935 amendments, Congress expressed a policy that questions of coverage and classification of work, as well as of specific rates, be resolved in a pre-contracting centralized administrative setting. It is obvious that entertainment of such issues in a post-contracting judicial setting via *ad hoc* individual litigation would be destructive of that policy designed to preserve efficient execution of federal projects. It cannot be assumed that Congress implicitly

intended to create an individual right of action divorced from the administrative scheme to secure the individual benefits afforded by the Act.

Apart from the Respondent's inability to square his claim for a post-contracting right of action against the contractor (urging the court to make an original and retroactively applicable coverage determination), with Congress' expressed policy to avoid such disputes, Respondent has failed to show any other traditionally recognized indicia of congressional intent to create such a right of action. *Cort* v. *Ash, supra.* Thus, he has failed to find any support in the legislative history. Both the 1935 amendments and the history of later unsuccessful attempts at further amendment run contrary to Respondent's position. See discussion of this point at pp. 15-20 of Petitioner's principal brief and at p. 13 of the Brief for the United States as *Amicus Curiae.*

Further, as pointed out by the Fifth Circuit Court of Appeals in *U.S.* v. *Capelletti Brothers, Inc., supra,* at part II.2 of that Court's opinion, the Portal-to-Portal Pay Act statute of limitations issue raised by the instant Respondent (Brief for Respondents, pp. 46-48) is not persuasive. The history of that Act plainly shows that Congress did not believe it was creating a right of action divorced from the existing Davis-Bacon Act enforcement scheme when it adopted the Portal-to-Portal Act.

Similarly, Respondent has not shown how the proposed right of action would enhance the legislative scheme. It would do just the opposite, because it would upset the balance struck by Congress between its concern for payment of prevailing rates and its concern that federal pro-

jects not be disrupted by post-contracting disputes. This is not simply a case wherein the proposed remedy allegedly fills an unintended gap in the legislation, *cf. Whirlpool Corporation* v. *Marshall,* ..... U.S. ....., 100 Sup. Ct. 883 (1980); it is a case wherein the proposed remedy is an ill-disguised attempt to redefine an overall congressional objective by urging removal of administrative functions to the courts and by removing the timing of such functions from pre-contract to post-contract settings. This Court has strongly admonished, however, that:

> "The ultimate question [in implication cases] is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law."
>
> *Touche-Ross* v. *Reddington,* 422 U.S. 560, 578, 99 Sup. Ct. 2490 (1979).

In short, Respondent has not shown a basis for implying a right of action as proposed by Respondent. To imply such a right would, moreover, defeat a plainly stated congressional objective.

Conclusion

For the foregoing reasons, we again respectfully urge the Court to reverse the ruling of the Court of Appeals.

Respectfully submitted,

ROBERT E. MANN
Attorney for Petitioner Universities Research Association, Inc.

SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON
55 East Monroe Street
Chicago, Illinois 60603
(312) 346-8000
Of Counsel

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In the Supreme Court of the United States

October Term, 1980

UNIVERSITIES RESEARCH ASSOCIATION, INC.,
Petitioner,

v.

STANLEY E. COUTU

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF AMICI CURIAE OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO

LAURENCE J. COHEN
TERRY R. YELLIG
1125 15th Street, N.W.
Washington, D.C. 20007
Counsel for Building Trades Dept.

GEORGE KAUFMANN
2101 L Street N.W.
Washington, D.C. 20037
Of Counsel.

J. ALBERT WOLL
815 15th Street, N.W.
Washington, D.C. 20005

LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006
Counsel for AFL-CIO.

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BRIEF AMICI CURIAE OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO

This brief *amici curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations, a federation of 104 national and international labor organizations having a total membership of approximately 13,500,000 working men and women, and the Building and Construction Trades Department, a Department of the AFL-CIO, which is composed of 15 such unions having a total membership of 4,000,000, with the consent of the parties as provided for in Rule 42 of this Court.

ARGUMENT

The Davis-Bacon Act, 40 U.S.C. § 276a et seq., and related legislation,[1] imposes two sets of obligations, both for the "benefit of construction workers" (*U.S.* v. *Binghamton Construction Co.*, 347 U.S. 171, 178). First, the Act requires the Government agency letting or financing certain contracts for "construction, alteration and/or repair, including painting and decorating" [2] to include in those contracts a provision for the payment of "minimum wages" to the "laborers and mechanics" employed to do that work "based on the wages * * * determined by the Secretary of Labor to be prevailing on [similar] projects [in the area]"; second, of course, the Act also requires the contractors to whom the work is let to pay those wages in the manner specified.

The instant case is a suit by workers against a contractor for back wages alleging a breach of the latter obligation. The ultimate merits issue raised by the complaint is whether the work the plaintiffs performed, and for which they were paid less than the applicable minimum wage, is "construction, alternation and/or repair" and therefore

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[1] For a compilation of the laws that extend Davis-Bacon's minimum wage provisions to various types of federally-supported construction see 29 C.F.R., Part 1, App. A. See also: 40 U.S.C. 276c (the Copeland-Anti-Kickback Act) (which provides the Secretary of Labor further authority in the administration and enforcement of the Davis-Bacon and related Acts); and Reorganization Plan No. 14 of 1950 (5 U.S.C. App. at 746) (which grants the Secretary of Labor authority to prescribe standards, regulations and procedures to be observed by contracting agencies).

[2] The meaning of this statutory phrase has been elaborated in the Secretary of Labor's regulations promulgated pursuant to the Act:

> The terms "construction," "prosecution," "completion,"

covered by the Davis-Bacon Act. The threshold issue is whether the Act creates such a right of action by workers against contractors.

The very fact that Davis-Bacon creates two sets of obligations suggests that a suit against the contractor is not the only possible means by which construction workers may vindicate their rights as declared in that Act. This controversy, after all, was precipitated by the *contracting agency's* determination that the work the plaintiffs performed is not Davis-Bacon work.[3] And, the two Courts of

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or "repair" mean all types of work done on a particular building or work at the site thereof or under the United States Housing Act of 1937 and the Housing Act of 1949 in the construction or development of the project, including without limitation, altering, remodeling, painting and decorating, the transporting of materials and supplies to or from the building or work by the employees of the construction contractor or construction subcontractor, and the manufacturing or furnishing of materials, articles, supplies or equipment on the site of the building or work, or under the United States Housing Act of 1937 and the Housing Act of 1949 in the construction or development of the project, by persons employed by the contractor or subcontractor. A mere token beginning of the work shall be deemed to be the "beginning of construction" as that term is used in the National Housing Act. [29 C.F.R. 5.2(g). See also Federal Procurement Regulations, 41 C.F.R. 1-18.701.]

[3] In a most recent expression on the subject, the Attorney General concluded that it "is well-established that the Secretary of Labor has the authority to interpret the substantive provisions of contract labor standards statutes, including the provisions concerning coverage. * * * The Secretary decides whether a particular class of contracts is covered by a [particular minimum wage] statute based upon the standards outlined in the statutes within the bounds of administration discretion." (43 Op. Att'y. Gen. No. 14, pp. 6, 20-21; March 9, 1979.) Nevertheless, as this case demonstrates, contracting agencies often make coverage determinations without consulting the Secretary. And, the government recognized

Appeals that have reached the question have concluded that such determinations are subject to judicial review. (*North Georgia Bldg. & Const. Trades* v. *Goldschmidt,* ..... F.2d ..... (C.A. 5, No. 77-1581, July 15, 1980); *Com. of Va., Ex. Rel. Com'r., Etc.* v. *Marshall,* 599 F.2d 588 (C.A. 4); cf., *Fry Bros. Corp.* v. *Department of Housing, Etc.,* 614 F.2d 732 (C.A. 10); see also *International U. of Operating Eng., Local 627* v. *Arthurs,* 480 F.2d 603 (C.A. 10) affirming 355 F.Supp. 7 (W.D. Okla.).) Whether or not the Seventh Circuit's decision concerning the availability of direct actions against contractors is affirmed, we submit that the Fourth and Fifth Circuit rulings on the reviewability of final agency action under the Davis-Bacon Act are plainly correct. For, as we now show, the law governing the implication from federal statutes of rights of action against private parties is entirely distinct from the law governing judicial review of agency action, and the basic principles developed in the latter area lead inevitably to the conclusion that contracting agency Davis-Bacon coverage decisions are reviewable in court.[4]

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in its brief *amicus curiae* in support of the petition for *certiorari* in this case (at p. 20, n. 17) "neither the Davis-Bacon Act nor the regulations promulgated thereunder now provide an administrative remedy in favor of an employee who has been injured by the failure to include prevailing wage provisions in a contract."

[4] In recognition of the distinction set out in the text, the Government, which seeks reversal of the decision below, notes "this case does not present the question whether an employee would have a cause of action against the Government (either at the time of contract bid solicitations or thereafter) to challenge a final agency decision not to include Davis-Bacon Act specifications in a contract. We express no views on this question." (U.S. Br. 17, n. 14.) We agree with this statement of the limits of the present action; we believe, however, that it will be helpful to the Court in analyzing the question presented to be more full-informed on the related

1(a) Congress has never addressed in universal terms the question of when federal statutes which are not explicit on the point create rights of action against private parties. Thus, as the Court stated in *Transamerica Mortgage Advisors* v. *Lewis*, 444 U.S. 11, the most recent relevant decision:

> The question whether a statute creates a cause of action, either expressly or by implication, is basically a matter of statutory construction. *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 568; *Cannon* v. *University of Chicago*, *supra* [441 U.S. 677], at 688; see *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453, 458 (*Amtrak*). While some opinions of the Court have placed considerable emphasis upon the desirability of implying private rights of action in order to provide remedies thought to effectuate the purposes of a given statute, *e.g.*, *J. I. Case Co.* v. *Borak*, *supra*, [377 U.S. 426], what must ultimately be determined is whether Congress intended to create the private remedy asserted, as our recent decisions have made clear. *Touche Ross & Co.* v. *Redington*, *supra*, at 568; *Cannon* v. *University of Chicago*, *supra*, at 688 [444 U.S. at 15-16.]

And, as the ensuing discussion (*id.* at 16-24) shows, the "dispositive question" to be decided through investigation of the particular statute's language, structure and legislative history, is "whether Congress intended to create any such remedy" (*id.* at 24).

(b) The legal setting when the question is whether Congress has empowered the courts to entertain a suit seeking review of a final agency action is quite different. The Court in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, established:

> [A] survey of such cases shows that judicial review

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question noted, but not developed, by the Government. That is the purpose of the balance of our brief. Because the correctness of the Court of Appeals' decision herein is discussed at length by the

of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress. * * * Early cases in which this type of judicial review was entertained, have been reinforced by the enactment of the Administrative Procedure Act which embodies the basic presumption of judicial review to one "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of relevant statute," 5 U.S.C. § 702, so long as no statute precludes such relief or the action is not one committed by law to agency discretion, 5 U.S.C. § 701 (a). The Administrative Procedure Act provides specifically not only for review of "[a]gency action made reviewable by statute" but also for review of "final agency action for which there is no other adequate remedy in a court," 5 U.S.C. § 704. The legislative material elucidating that seminal act manifests a congressional intention that it cover a broad spectrum of administrative actions,[2] and this Court has echoed that theme by noting that the Administrative Procedure Act's "generous review provisions" must be given a "hospitable" interpretation. *Shaughnessy* v. *Pedreiro*, 349 U.S. 48, 51 * * *. Again in *Rusk* v. *Cort, supra,* [369 U.S. 367] at 379-380, the Court held that only upon a showing of "clear and convincing evidence" of a contrary legislative intent should the courts restrict access to judicial review.

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[2] See H.R. Rep. No. 1980, 79th Cong., 2d Sess., 41 (1946): "To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review." See also S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1946). [*Id.* at 140-141; citations ommitted.]

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parties and by the Government, and because we have nothing of substance to add to respondent Coutu's arguments supporting his cause of action, we do not revisit that subject except to explore a matter central to all aspects of the overall problem raised by this case—the Davis-Bacon Act's legislative history.

Moreover, as *Barlow* v. *Collins*, 397 U.S. 159, emphasized:

> Since the only or principal dispute relates to the meaning of the statutory term, the controversy must ultimately be resolved, not on the basis of matters within the special competence of the Secretary, but by judicial application of canons of statutory construction. See *Texas Gas Transmission Corp.* v. *Shell Oil Co.*, 363 U.S. 263, 268-270. ["The role of the courts should, in particular, be viewed hospitably where . . . the question sought to be reviewed does not significantly engage the agency's expertise. [W]here the only or principal dispute relates to the meaning of the statutory term' . . . [the controversy] presents issues on which courts, and not [administrators], are relatively more expert."] *Hardin* v. *Kentucky Utilities Co.*, 390 U.S. 1, 14 (HARLAN, J., dissenting). [397 U.S. at 166.]

Additionally, in *Barlow's* companion case, *Data Processing Service* v. *Camp*, 397 U.S. 150, the Court disapproved those earlier cases that had required parties challenging agency action to demonstrate, in order to show their standing to sue, that "the right invaded is a legal right—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege" (*id.* at 153 quoting *Tennessee Power Co.* v. *TVA*, 306 U.S. 118, 137-138).[5] For:

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[5] In *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, the Court held that companies challenging a minimum wage determination under the Public Contracts Act (49 Stat. 2306 (1936)) lacked "standing to sue" (*id.* at 132), stating in support of that holding:

> We are of opinion that no legal rights of respondents were shown to have been invaded or threatened in the complaint upon which the injunction of the Court of Appeals was based. It is by now clear that neither damage nor loss of income in consequence of the action of Government, which is not an invasion of recognized legal rights, is in itself a source of legal rights in the absence of constitutional legislation recognizing it as such. Respondents, to have standing in court, must show an injury or threat to a particular right of their own, as distinguished from the public's interest in the administration

> The "legal interest test" goes to the merits. The question of standing is different. It concerns, apart from the "case" or "controversy" test * * * [—] whether the dispute sought to be adjudicated will be presented in an adversary content and in a form historically viewed as capable of judicial resolution [—] * * * the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. Thus the Administrative Procedure Act grants standing to a person "aggrieved by agency action within the meaning of a relevant statute". 5 U.S.C. § 702 (1964 ed. Supp. IV). [397 U.S. at 151-52, 153.]

The Courts of Appeals have uniformly concluded that it follows inescapably from the principles stated in *Abbott Laboratories, Barlow* and *Data Processing* that the judiciary has the authority to determine suits seeking review of final agency action by contracting agencies brought by those alleging that the agency action has caused them "economic * * * injury in fact" (*Data Processing,* 397 U.S. at 152), except in the particular instances in which the Government shows " 'clear and convincing evidence' of a contrary legislative intent" (*Abbott Laboratories,* 387 U.S. at 141). (See, e.g., *Scanwell Laboratories, Inc.* v. *Shaffer,* 424 F.2d 859, 865 (C.A. D.C.); *Merriam* v. *Kunzig,* 476 F.2d 1233, 1240 (C.A. 3), *cert. denied,* 414 U.S. 199; *William F. Wilkie, Inc.* v. *Department of the Army of U.S.,* 485 F.2d 180, 192 (C.A. 4); *Hayes Int'l. Corp.* v. *McLucas,* 509 F.2d 247, 258 (C.A. 5).) [6]

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of the law. [*id.* at 125; footnotes omitted]

The leading authority cited to support this reasoning was *Tennessee Power Co.* (See 310 U.S. at 125, n. 10.) Thus, there can be no doubt that the "standing" holding of *Lukens Steel,* like that of *Tennessee Power* itself, is no longer authoritative.

[6] To be sure, as the Government argues (U.S. Br. 31-32), any right to challenge the correctness of an agency determination im-

We therefore turn directly to the question of whether there is such evidence.

2(a) The Davis-Bacon Act does not expressly provide for judicial review, nor does it even address that subject in terms. But, as the sponsors of Administrative Procedure Act stated that is "certainly no evidence of intent to withhold review". (S. Rep. No. 752, 79th Cong., 1st Sess., 26, quoted in *Abbott Laboratories,* 387 U.S. at 140, n.2.) The structure and purpose of Davis-Bacon, moreover, support the proposition that the courts have the authority to decide review cases brought by employees adversely affected by contracting agency decision as to whether particular work comes within the statutory term defining the scope of the Davis-Bacon Act—"construction, alteration and/or repair." "The role of the courts should, in particular, be viewed hospitably where . . . the question sought to be reviewed does not significantly engage the agency's expertise '[W]here the only or principle dispute relates to the meaning of the statutory term' . . . [the controversy] presents issues on which courts, and not [administrators], are relatively more expert." (*Barlow,* 397 U.S. at 166.) Additionally, "[o]n its face, the [Davis-Bacon] act is a minimum wage law designed for the benefit of construction workers". (*Binghamton Construction Co.,* 347 U.S. at 178.) And,

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poses some costs in terms of possible delay and uncertainty. But that argument provides no basis for concluding that those costs are higher in the procurement context than in the other instances to which the APA reviewability presumption applies, or that Congress was wrong in concluding that such costs are outweighed by the costs of failing to assure that agency action comports with the law. *Abbott Laboratories* itself concerned the right to review agency action designed to implement the vital interests in public health and safety protected by the Federal Food, Drug and Cosmetics Act.

> The right of judicial review is ordinarily inferred where congressional intent to protect the interests of the class of which the plaintiff is a member can be found; in such cases, unless members of the protected class may have judicial review the statutory objectives might not be realized. [*Barlow*, 397 U.S. at 167.]

(b) The Davis-Bacon Act became law in 1931 (46 Stat. 1494), and its substantive provisions have been amended twice (49 Stat. 1011 (1935) and 78 Stat. 238 (1964).[7] For present purposes, the 1931 and 1935 legislative history can be dealt with summarily:

The only extended discussion in the 1931 Committee Reports and floor debates[8] remotely bearing on the issue of judicial review is Rep. Bacon's comment:

> In 90% of the cases [the Secretary of Labor] feels there will be no dispute of any kind. Where there is a dispute which cannot be ironed out on the spot by the contracting officer of the government, the matter will be referred to the Secretary of Labor for final decision. The Department of Labor has a well-organized conciliation service; the administration feels the officer of this service, when called on, will be able, without trouble, to settle disputes amicably, expeditiously and to the satisfaction of everyone. [74 Cong. Rec. 6511; see also *id.* at 3919 (Sen. LaFollette), *id.* at 6515 (Rep. Kopp) & *id.* at 6520 (Rep. Zihlman), all to the same effect.]

The anticipation that the Secretary's delegates, or where necessary the Secretary himself, will be able to settle disputes generated by the Act and its administration to the satisfaction of the affected parties obviously is not the equivalent of an intent to preclude judicial review of final

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[7] The only other Davis-Bacon amendments, 54 Stat. 399 (1940) and 74 Stat. 418 (1960), expanded the Act to cover the territories of Alaska and Hawaii and then, when those territories became States, made the necessary technical change.

[8] H.R. Rep. No. 2453, 71st Cong., 2d Sess.; S. Rep. No. 1445, 71st Cong., 2d Sess.; 74 Cong. Rec. 6504-21 (House), 3818-19 (Senate).

agency action in those instances in which that anticipation is not realized.

In reviewing the legislative history of the 1935 amendments,[9] which provide for predetermination of minimum wages and create certain remedies against contractors who violate the Act's provisions, and which were passed without amendment or debate, we have not found a word on the question of the judiciary's authority to redress erroneous agency action. This question did, however, receive consideration during the debate over the 1964 amendments.

In 1963 the House Education and Labor Committee reported out a bill (H.R. 6041) to include fringe benefits in the computation of Davis-Bacon minimum wages. The Committee Report deals solely with that subject. (See H.R. Rep. No. 803, 88th Cong., 1st Sess.) In supplemental views, Representatives Frelinghuysen, Ayres, Quie, Goodell and Bell argued that the Committee bill should be expanded to include, *inter alia,* a provision expressly providing for judicial review. (*Id.* at 29.)

When, during the next year, the full House of Representatives considered H.R. 6041, the parliamentarian ruled that amendments to that bill going beyond the subject of fringe benefits would not be germane and thus would not be in order under the House rules. (See 110 Cong. Rec. 1195-1196.) An effort was therefore made to waive the House rules in order to permit consideration of non-germane amendments to H.R. 6041, including a proposal by Rep. Goodell providing for judicial review of prevailing wage determinations by the Secretary of Labor. Four of the Congressmen who spoke in favor of following ordinary

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[9] H.R. Rep. No. 756, 74th Cong., 1st Sess.; S. Rep. No. 1155, 74th Cong. 1st Sess.; 79 Cong. Rec. 14384 (House), 12072-4 (Senate).

procedure—Reps. James Roosevelt, Pucinski, Fogarty and Sisk—addressed the Goodell amendment. Rep. Roosevelt set the tone by stating:

> Mr. Speaker, may I first point out that the debate up to this point has been largely about a matter which is not in this bill under consideration here today. The debate up to this point has been on the merits of a proposition which perhaps has some merit. * * *
>
> What are they asking? What is all the fuss about, then? They are asking that we now open up this bill so that sitting here in the Committee of the Whole we may do the job of the Committee on Education and Labor instead of letting the committee do it in the orderly processes, which I am sure everybody in this House fully understands. [110 Cong. Rec. at 1198; see also to the same effect *id.* at 1202 (Rep. Sisk).] [10]

And Rep. Fogarty added:

> And what will the court do [under the Goodell amendment]? It will consider, from the very beginning, what wage determination is appropriate for this project, an area in which they would have no competence at all. The court will disregard entirely what the Secretary did; reexamine all the evidence upon which the Secretary made his determination; and it may disregard any established practice, policy, or rule on which the Secretary acted. [110 Cong. Rec. 1201.]

The effort to waive the rules and to consider non-germane

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[10] Rep. Pucinski made the same point in a slightly different fashion:

> I cannot think of anything which could be more catastrophic to the cause of labor-management relations in the building industry than for the House to vote down the previous question at this time and to open this bill to massive revision at this time here on the floor of the House, when both the gentleman from Michigan and the gentleman from New York know that we are now in the process of holding hearings on the administration of this bill in the committee.
>
> I happen to agree with my colleague from Michigan that the

amendments was then defeated 297 to 105.[11]

Thereafter Rep. Goodell moved adoption of an amendment, ruled germane by the parliamentarian, providing for judicial review solely of the Secretary's fringe benefit determinations. (110 Cong. Rec. 1226-1227.) Reps. Roosevelt and Gill spoke against the Goodell amendment. Rep. Roosevelt began: "Mr. Chairman, may I suggest to my colleagues that the colloquy we have just heard is evidence [that you] are being asked to do by indirection what could not be done directly by the previous vote in the House," and added, "I would respectfully ask the Members of the Committee [of the whole House] to allow the [Labor] committee to do its job and let us pass this bill on its merits and not get it mixed up with other matters that should be more fully debated." (110 Cong. Rec. 1228.) Rep. Gill added:

> I merely point out that in the language of H.R. 9590, Department of Labor has gone way off the reservation in seeking precedents to establish prevailing wage scales.
>
> But I do not agree with my colleagues from New York and from Michigan that a judicial review procedure would give us the relief we are seeking. Judicial review cannot go beyond what is in this law. Until we have perfected the law to more precisely define the areas within which the Department of Labor can operate; how far could the Department of Labor go in seeking precedents for prevailing wages; until we spell out the intent of Congress in the very complicated area, the courts cannot go beyond what the Congress has provided or failed to provide in determining prevailing wage standards. For the Congress now to vote down the previous question and permit consideration and possible adoption of judicial review under the present law would create a degree of confusion in our district courts unprecedented in the courts' history. [110 Cong. Rec. 1200.]

[11] During the ensuing general debate on the Committee bill, Rep. Dent made an extensive statement arguing both that Rep. Goodell's proposal was unsound and that as a general matter judicial review of wage determinations is unwise. (110 Cong. Rec. 1210-1216.) So far as we have found, only Rep. Dent of H.R. 6041's supporters squarely took the latter position.

> which is the substance of the amendment which has been offered, the court, once its jurisdiction is asked for, would give no presumption of validity to any determination by reason of any prior administrative act of the Secretary of Labor; in other words, it would all start over from scratch, which would mean it would not be a short hearing. That would mean that all data would be presented. It would mean that perhaps several months of proceedings in the trial court would be required before there could be a ruling * * * [110 Con. Rec. 1229.]

Rep. Goodell's amendment was rejected (110 Cong. Rec. 1229).[12]

In the Senate, which accepted the House bill without amendment or floor debate (110 Cong. Rec. 14768-70), the only discussion of judicial review is contained in the Senate Labor Committee Report which concludes: "It has also been suggested to this committee as it was to the House of Representatives that the bill be amended to provide for judicial review of all predeterminations of wage rates. The committee shares the view of the overwhelming majority of the House Members that this suggestion should not be accepted." (S. Rep. No. 963, 88th Cong., 2d Sess., 4 (1964).)

Neither the House's determination not to waive its rules to consider a non-germane judicial review amendment, that body's rejection of alternative versions of that amendment which were viewed as transparent efforts to evade its determination to confine consideration of H.R. 6041 to the fringe benefit issue, a Senate Report finding a particular proposal for judicial review of wage determinations want-

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[12] Rep. Hall then moved an even narrower amendment providing for judicial review of fringe benefit determinations relating to construction for educational institutions. (110 Cong. Rec. 1230.) This amendment was also defeated after an inconclusive discussion of whether review in the Court of Claims was already available.

ing, or these three elements in conjunction, can overcome the presumption created by enactment of the Administrative Procedure Act that final agency action defining the scope of federal laws is subject to judicial review.

Indeed, even if the 1964 legislative history could be viewed as an outright rejection of the Goodell proposal, that rejection would not support the conclusion that Congress thereby intended to insulate *all* agency action pursuant to Davis-Bacon from judicial review. Ten years earlier this Court had held:

> Congress sought to * * * protect [contractors'] employees from substandard earnings by fixing a floor under wages on Government projects * * * by directing the Secretary of Labor to determine, on the basis of prevailing rates in the locality, the appropriate minimum wages for each project. The correctness of the Secretary's determination is not open to attack on judicial review. [*Binghamton Construction Co.*, 347 U.S. at 177; footnote omitted.]

The principle that squares that conclusion with the APA presumption of reviewability was lucidly explained by Mr. Justice Douglas in *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309. There Grace Lines alleged that the Canal Company, in setting tolls had not conformed to the formula set out in § 412(b) of the Canal Zone Code (a view shared by the Comptroller General). (See *id.* at 310-316.) The Court refused the relief sought:

> Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. § 1009, excludes from the categories of cases subject to judicial review "agency action" that is "by law committed to agency discretion." * * * The present conflict rages over questions that at heart involve problems of statutory construction and cost accounting: whether an operating deficit in the auxiliary or supporting activities is a legitimate cost in maintaining and operating the Canal for purpose of the toll

> formula. These are matters on which experts may disagree; they involve nice issues of judgment and choice, * * * which require the exercise of informed discretion. * * * The petitioner, as agent of the President, is given questions of judgment requiring close analysis and nice choices. * * * [*Id.* at 317.]

Basing his analysis on *Panama Canal Co.*, Judge Adams has incisively observed:

> [The] courts have been especially inclined to regard as unreviewable those aspects of agency decisions that involve a considerable degree of expertise or experience, or that are based upon economic projections and cost analyses, at least when the agency has broad leeway to devise the formula to be applied in any particular situation and when there are no discernible guidelines against which the agency decision may be measured. [*Local 2855, AFGE (AFL-CIO)* v. *United States*, 602 F.2d 574, 579 (C.A. 3).]

That statement captures with exactness the nature of the task Congress has delegated to the Secretary of Labor in directing him to determine the wages that are "prevailing for the corresponding classes of laborers and mechanics employed on [similar] projects [in the area]," and explicates the result reached in *Binghamton Construction Co.*

In essence then, Rep. Goodell's proposal sought to reverse *Binghamton Construction Co.* and thereby to extend judicial review beyond its normal confines. Rejection of that proposal could not justify denying review where it is ordinarily available and most urgently needed—"where the only or principle dispute relates to the meaning of a statutory term" and where the suit is brought by "a member * * * of the class [Congress] intend[ed] to protect" who alleges that unless review is provided "the statutory objectives might not be realized" (*Barlow*, 397 U.S. at 166-167).

This point is made more binding when the objections to the Goodell amendment voiced by Reps. Fogarty and Gill are taken into account. Both stressed that the amendment would empower the courts to make their own wage determinations *de novo,* thereby displacing the Secretary to whose expert judgment Congress had delegated the task of making wage determinations. (See pp. 12, 13-14, *supra.*) Such a grant of authority to the courts would, of course, run counter to the wise allocation of authority embodied, for example, in the primary jurisdiction doctrine. (Compare, *Far East Conf. v. United States,* 342 U.S. 570, 574-575.)

In *North Georgia Building & Const. Trades,* the Fifth Circuit concluded:

> The district court's review focused on the Board's conclusion that the Davis-Bacon Act was not effective before an application for federal assistance was received by the contracting agency. The Administrative Procedure Act permits judicial review unless "(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law."
>
> Under the Act, a statute is deemed to restrict access to judicial review "only upon a showing of 'clear and convincing evidence' of . . . legislative intent." The Davis-Bacon Act does not expressly preclude judicial review. Those portions of the legislative history which suggest a preclusion of review are addressed to review of wage determinations, not of agency decisions as to the coverage of the Davis-Bacon Act. We conclude that judicial review of the Wage Appeals Board's decision as to the applicability of the Davis-Bacon Act is not precluded by that Act. [Sl. Op. pp. 7380-7381; footnotes omitted.]

That conclusion accords with this Court's reminder "An agency may not finally decide the limits of its statutory power. That is a judicial function" (*Social Security Board*

v. *Nierotko*, 327 U.S. 358, 369), and properly applies the rule stated in *Abbott Laboratories* to the Davis-Bacon Act.[13]

CONCLUSION

For the reasons stated by the respondent the judgment below should be affirmed; alternatively, if that judgment is reversed, that should for the reasons stated above, be accomplished in a manner that leaves the right to secure judicial review of final agency action as to the coverage of the Davis-Bacon Act unimpared.

Respectfully submitted,

LAURENCE J. COHEN
TERRY R. YELLIG
1125 15th Street, N.W.
Washington, D.C. 20007
Counsel for Building Trades Dept.

GEORGE KAUFMANN
2101 L Street N.W.
Washington, D.C. 20037
Of Counsel.

J. ALBERT WOLL
815 15th Street, N.W.
Washington, D.C. 20005

LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006
Counsel for AFL-CIO.

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[13] Ordinarily Davis-Bacon review cases will not present difficult question of remedy since if successful they will result in a directive to the Secretary of Labor to make the requisite wage determination. We note, however, that where the work has been done for less than the applicable wage by reason of agency error, the Act repells any suggestion that the workers should bear the loss and the question of whether the Government or the contractor should ultimately shoulder that expense is not a clear one. The contractor must pay it is settled where the increase stems from "an exercise of the sovereign power of the United States." (*The Metrig Corporation* v. *U.S.*) 427 F.2d 778 (ct. cl.).) On the other hand, if the Government is deemed to have acted in its "contractual capacity" in providing for increased wage payments, it appears that the added cost falls on the Government. (See *Morrison-Hardeman-Perini-Leavell* v. *U.S.*, 392 F.2d 988 (ct. cl.).)

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UNIVERSITIES RESEARCH ASSOCIATION, INC.,
PETITIONER

v.

STANLEY E. COUTU

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. MCCREE, JR.
Solicitor General

ALICE DANIEL
Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

HARRIET S. SHAPIRO
Assistant to the Solicitor General

ROBERT E. KOPP
ELOISE E. DAVIES
Attorneys
Department of Justice
Washington, D.C. 20530

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v.

STANLEY E. COUTU

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTION PRESENTED

Whether the Davis-Bacon Act confers a private right of action for back wages against a contractor in favor of an employee who has performed work under a contract that has been administratively determined not to call for Davis-Bacon work and that accordingly does not contain prevailing wage specifications.

INTEREST OF THE UNITED STATES

The Davis-Bacon Act, 40 U.S.C. 276a *et seq.*, requires the payment of prevailing wages, as determined

by the Secretary of Labor, to laborers and mechanics employed under certain federal construction contracts. This case involves the question whether a worker may sue the contractor to challenge the contracting agency's determination that the contract under which he is employed is not subject to the Act.

This issue is of substantial importance to the United States. The Davis-Bacon Act is administered by the Department of Labor and the various federal agencies that enter into construction contracts. The Court's decision may thus affect the administration of a large number of government contracts. In recognition of the government's substantial interest in the question presented, the Court requested our views at the petition stage in this case and in *University of Chicago* v. *McDaniel*, cert. denied, 434 U.S. 1033 (1978), which involved a similar issue.

STATUTES INVOLVED

The Davis-Bacon Act, 40 U.S.C. 276a *et seq.*, is set forth in pertinent part at Pet. App. D.

Section 2 of the Miller Act, 40 U.S.C. 270b, provides:

> (a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under sections 270a to 270d of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to

prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. * * *

(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by him. The United States shall not be liable for the payment of any costs or expenses of any such suit.

STATEMENT

1. The Davis-Bacon Act, 40 U.S.C. 276a *et seq.*, requires that all federal contracts in excess of $2,000 for "construction, alteration, and/or repair * * * of public buildings or public works" contain a provision obligating the contractor and its subcontractors to pay laborers and mechanics employed thereon not less than the wages prevailing in the locality, as determined by

the Secretary of Labor (40 U.S.C. 276a(a)). The Act also requires that such contracts contain a provision authorizing the contracting officer to withhold from the contractor amounts that are sufficient to pay workers the difference between the wage rates required by the contract and the wage rates actually received (*ibid.*). The Act directs the Comptroller General to use the withheld funds to pay workers any wages found due under the Act (40 U.S.C. 276a–2(a)).[1]

If the funds withheld are insufficient to make reimbursements in full, laborers and mechanics have the same right of action against the contractor and his sureties as that conferred by the Miller Act, 40 U.S.C. (and Supp. II) 270a *et seq.*, upon persons furnishing labor and material (40 U.S.C. 276a–2(b)). The Miller Act requires any person entering into a contract exceeding $25,000 for the "construction, alteration, or repair of any public building or public work of the United States" to furnish certain bonds to the United States, including a payment bond for the protection of persons supplying labor or material for use in the contract work (40 U.S.C. (Supp. II) 270a(a)(2)). Suits on these bonds may be brought by any person who has furnished labor or material in the performance of the contract and has not been paid in full within 90 days (40 U.S.C. 270b(a)). See generally *J.W. Bateson Co.* v. *Board of Trustees*, 434 U.S. 586 (1978).

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[1]The Act in addition provides administrative sanctions for failure to pay the specified minimum wages, including termination of the contract (40 U.S.C. 276a–1) and debarment of the contractor from future contract awards for a three-year period (40 U.S.C. 276a–2).

Subsequent to the enactment of the Davis-Bacon Act, Congress extended the Davis-Bacon prevailing wage requirements to federally-assisted construction contracts to which the United States is not a party. Thus, approximately 60 related statutes (see, *e.g.*, 29 C.F.R. Part 1, App. A) provide that contracts for federally-assisted construction must contain provisions that guarantee laborers and mechanics working under the contracts not less than the locally prevailing wages as determined by the Secretary of Labor. As a result of the Davis-Bacon Act and these related statutes, each year prevailing wage provisions are required to be included in thousands of contracts of various types (competitively bid, negotiated, fixed cost, cost plus, etc.) entered into or administered by many different government agencies.

In order to provide coordination of administration and consistency in the enforcement and application of the labor standards provisions of the Davis-Bacon and related Acts, President Truman promulgated Reorganization Plan No. 14 of 1950 (5 U.S.C. App., at 746). The Reorganization Plan directs the Secretary of Labor to "prescribe appropriate standards, regulations, and procedures" to be observed by the contracting agencies.[2] It further authorizes the Secretary

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[2]The Copeland Anti-Kickback Act, 40 U.S.C. 276c, provides the Secretary further authority in the administration and enforcement of the Davis-Bacon and related Acts by directing the Secretary to promulgate reasonable regulations for contractors and subcontractors, including a provision requiring the weekly submission of statements regarding the wages paid on covered work. Moreover, Section 10 of the Portal-to-Portal Act of 1947 (29 U.S.C. 259) provides that an employer shall not be subject to any liability for failure to pay wages required by the Davis-Bacon Act if he proves good faith reliance on "any written ad-

to make such investigations as he deems desirable to assure compliance with the enforcement of the labor standards. However, the President's message accompanying the Reorganization Plan states that "[t]he actual performance of enforcement activities, normally including the investigation of complaints of violations, will remain the duty of the respective agencies awarding the contracts or providing the Federal assistance." 5 U.S.C. App., at 746.

Pursuant to the Reorganization Plan, the Secretary of Labor has promulgated regulations implementing the Davis-Bacon and related Acts. See 29 C.F.R. Parts 1, 3, 5 and 7. Part 5 of the regulations provides guidelines for the application and enforcement of the labor standards provisions, including, for example, coverage definitions (29 C.F.R. 5.2).[3] The procurement regulations of the various contracting agencies contain additional guidelines concerning the application of the labor standards provisions, adapted to the requirements of the particular agencies.[4]

The initial determination as to whether a particular contract or group of contracts is covered by the Davis-Bacon Act or a related Act is made by the con-

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ministrative regulation, order, ruling, approval, or interpretation" of the Secretary of Labor. See also 29 C.F.R. 5.12.

[3]Part 1 provides procedures for the predetermination of prevailing wage rates. Part 3 was promulgated pursuant to the Copeland Act (see note 2, *supra*) and contains requirements for the submission of weekly payroll data and procedures governing payroll deductions. Part 7 concerns practice before the Wage Appeals Board, an administrative body designed to hear appeals of final administrative decisions made under Parts 1, 3 and 5.

[4]The Department of Energy regulations relating to the Davis-Bacon Act are found in 41 C.F.R. Subpart 9–18.7.

tracting agency (or the agency providing the federal funding). If the agency determines that a proposed contract is subject to the Davis-Bacon Act or a related Act, the agency either extracts a schedule of prevailing wages from those published in the Federal Register by the Department of Labor or, if no prevailing wage determination has been published for the relevant geographic area or type of construction, requests the Wage and Hour Division of the Department of Labor[5] to make a determination. The prevailing wage determination and the appropriate Davis-Bacon labor standards provisions are then incorporated in the invitation for bids and in any resulting contract. See 29 C.F.R. 5.5.

During the period of construction, the contracting agency or the Department of Labor may undertake an investigation in order to insure compliance with the labor standards provisions in the contract. If wage violations are found, the agency's contracting officer on his own initiative or upon the request of the Department of Labor may withhold amounts due the con-

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[5]29 C.F.R. 1.5. The regulations of the Department of Labor establish a procedure of administrative review of the Department's wage rate determinations, provided the wage rates are contested prior to award of the contract or subcontract at issue (29 C.F.R. 1.7). Any "interested person," which includes contractors, labor organizations, individual employees, and contracting agencies, may seek such review before the Wage Appeals Board, which acts finally for the Secretary of Labor on such matters. 29 C.F.R. 1.16 and Part 7. The correctness of the Secretary's prevailing wage determinations is not subject to judicial review. See, *e.g.*, *United States* v. *Binghamton Construction Co.*, 347 U.S. 171, 177 (1954). *Nello L. Teer Co.* v. *United States*, 348 F.2d 533, 539 (Ct.Cl. 1965), cert. denied, 383 U.S. 934 (1966); *Commonwealth of Virginia* v. *Marshall*, 599 F.2d 588, 592 (4th Cir. 1979); *Fry Bros. Corp.* v. *HUD*, 614 F.2d 732, 733 (10th Cir. 1980).

tractor that are sufficient to offset any violations.[6] Back wages due employees are paid from any amounts withheld from the contractor.

If a contracting agency determines that a contract is not subject to the Davis-Bacon Act or a related Act, it of course does not request a wage determination from the Department of Labor and does not include the Davis-Bacon labor standards provisions in the contract specifications. A contractor, labor organization or employee may appeal a final agency determination of non-coverage to the Department of Labor pursuant to 29 C.F.R. 5.12 and 7.9 at the bid solicitation stage prior to the agency's award of the contract.[7]

2. This case involves a contract between the United States and petitioner Universities Research Association, Inc., a not-for-profit consortium of universities.

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[6] Federal procurement regulations require the inclusion in covered contracts of a clause providing that disputes concerning the proper classification of laborers and mechanics or the applicability of the labor provisions of the contract will be referred to the Secretary of Labor for final determination (41 C.F.R. 1-18.703-1(i)). Moreover, questions involving the application or interpretation of the Department of Labor's regulations relating to the Act and of the Act's provisions must be referred to the Department of Labor for a ruling pursuant to 29 C.F.R. 5.12. See *North Georgia Building & Construction Trades Council* v. *Dep't of Transportation*, 399 F.Supp. 58 (N.D. Ga. 1975). An evidentiary hearing may be held in cases "involv[ing] significant sums of money, large groups of employees, or novel or unusual situations" (29 C.F.R. 5.11(b)). Any final agency action by the contracting agency or the Wage and Hour Division of the Department of Labor may then be appealed to the Wage Appeals Board (29 C.F.R. 7.9).

[7] The binding effect of the Department of Labor's determination on the contracting agency is the subject of some disagreement. Compare 43 Op. Att'y Gen. No. 14 (Mar. 9, 1979); 43 Op. Att'y Gen. No. 8 (Jan. 11, 1977); and 41 Op. Att'y Gen. 488 (1960) with 40 Comp. Gen. 565 (1961).

The contract (designated United States Contract No. AT (49–8)–3000) originally was negotiated by the Atomic Energy Commission. It later was assumed in turn by the Commission's successors, the Energy Research and Development Agency (ERDA) and the Department of Energy (DOE).[8] The contract requires petitioner to furnish scientific and technical management services to the United States in connection with the construction and operation of the Fermi National Accelerator Laboratory, a research laboratory located in Kane County, Illinois (Pet. Br. 3–4 & n.2).

The contract provides for the total funding of the project by the United States through the Department of Energy.[9] Petitioner is authorized to spend these funds (under DOE supervision) to construct, alter, and

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There is no administrative procedure now available expressly providing review, *after* a contract award, of an employee's claim that a contracting agency has made an incorrect Davis-Bacon coverage determination. However, Section 1.6(f) of proposed Department of Labor regulations (29 C.F.R. Part 1), published December 28, 1979 (44 Fed. Reg. 77029), provides for the post-award incorporation of wage determinations in contracts that do not originally include them. In addition, proposed Section 5.5(a)(9) (29 C.F.R. Part 5; 44 Fed. Reg. 77086 (1979)) includes disputes with employees in defining the types of labor standards disputes that must be resolved by the Department of Labor. The comment period for the proposed regulations expired on May 27, 1980. Several contracting agencies, including the Department of Energy, have objected to the proposed regulations, contending that the contracting agencies have final authority with respect to coverage determinations on a particular contract.

[8]See Energy Reorganization Act of 1974, 42 U.S.C. 5801 *et seq.*; Department of Energy Organization Act, 42 U.S.C. (Supp. I) 7101 *et seq.* The contract, now designated United States Contract No. EY-76-C-02-3000, remains substantially the same as originally negotiated.

[9]Congress has appropriated substantial funding for the Laboratory pursuant to 42 U.S.C. 2011 and 2051 *et seq.*

repair the laboratory and to employ scientific, technical, operational and administrative personnel necessary to its operation and administration. The contract terms track relevant DOE procurement regulations codified in 41 C.F.R. Chapter 9. The contract specifies the rates of compensation to be paid defined employee classifications. Prior to establishing any new classifications or adjusting the rates of compensation, petitioner must obtain approval from DOE.

With respect to the Davis-Bacon Act, Article XXXIII of the contract provides (Pet. App. A5):

> This contract does not contemplate the performance of work by [petitioner], with its own employees, which the Commission determines is subject to the Davis-Bacon Act. Such work, if any, performed under this contract shall be procured by subcontracts which shall be subject to the written approval of the Commission and contain the provisions relative to labor and wages required by law to be included in contracts for the construction, alteration, and/or repair, including painting and decorating, of a public building or public work.

To implement this provision, DOE officials review specific work projects and make determinations regarding Davis-Bacon Act coverage upon the contractor's request. Such requests are reviewed under guidelines established in 41 C.F.R. Subpart 9–18.7 by a special DOE Davis-Bacon committee, which is composed of members with technical, administrative, and legal expertise.[10] If the committee determines that the

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[10] 41 C.F.R. 9–18.701–51 and 9–18.701–52 identify various types of contract work that are not covered by the Davis-Bacon Act—*e.g.*, "servicing or maintenance work in an existing plant, including installation or movement of machinery * * * and plant rearrangement, which involve[s] only an incidental amount of

work to be performed is covered by the Davis-Bacon Act, the contractor subcontracts the work. Conversely, if the committee determines that the project does not require Davis-Bacon work, the contractor performs the work with its own employees.

Respondent Stanley E. Coutu was employed by petitioner from September 25, 1972, until September 10, 1975. He occupied various positions within the "technician" classification established by DOE in the contract and was compensated in accordance with the contract-prescribed salary and benefit schedules for that classification.[11] Respondent's duties included monitoring computers, assisting scientific personnel, supervising accelerator operation and record keeping. When not occupied with those duties, he occasionally

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work * * * that would otherwise be considered construction, alteration and/or repair" (41 C.F.R. 9-18.701-51(a)(3)), and "[e]mergency work to combat the effects of fire * * * accident or other casualties, and to restart the operational activity following the casualty [except] [w]ork which is not directly related to restarting the activity or which involves rebuilding or replacement of structure or structural components or equipment" (41 C.F.R. 9-18.701-52(a)(6)). The regulation also gives examples of the application of the Act to specific situations (41 C.F.R. 9-18.750-2), noting, for example, that "[a]t the time of turnover of a DOE facility * * * from construction to operation activities, * * * the facility [may be] turned over a section at a time * * * . Usually, it is essential that final checkout of a plant prior to the start-up of plant operations be performed by personnel of the operating contractor, and, as such, is not covered. The important thing is to work out a practical plan that will assure: (i) safe and effective startup of the facility, (ii) the fulfillment of obligations under applicable statutes, and (iii) continuing construction at the facility." 41 C.F.R. 9-18.750-2(g)(2).

[11] The hourly rates specified by the contract for contractor employees, who are steadily employed, are somewhat less than the prevailing wages established by the Department of Labor for similar classifications of Davis-Bacon Act workers, who are typically employed intermittently.

made minor repairs to malfunctioning equipment, assembled prefabricated equipment and assisted in connecting power sources to experimental equipment. Respondent's supervisors typically were high-rated technicians, professional engineers and physicists.

3. Respondent commenced this action in the United States District Court for the Northern District of Illinois on April 9, 1975, on behalf of himself and a class of mechanics and laborers who had performed work under the contract, seeking damages in excess of $5 million on the theory that petitioner paid them less than the locally prevailing wages required by the Davis-Bacon Act for construction work (Pet. App. A1). The complaint was in seven counts: Count I alleged that petitioner had violated the Davis-Bacon Act by not paying the minimum wages required by the contract and the prevailing wage determinations of the Secretary of Labor (Pet. App. A13, A15). Count II alleged a breach of petitioner's obligations under a contract falling within the purview of the Davis-Bacon Act (*id.* at A13, A24). The remaining counts were based on allegations of common law fraud, restitution, and contractual indebtedness, for which pendent federal jurisdiction was alleged (*id.* at A13).

The district court (Judge McGarr) dismissed Count I because it found that respondent's allegations were "not totally borne out by the alleged Contract" (Pet. App. A15, A22, A24). Relying on the Seventh Circuit's decision in *McDaniel* v. *University of Chicago*, 512 F. 2d 583, vacated and remanded, 423 U.S. 810 (1975), reaff'd on remand, 548 F. 2d 689 (1977), cert. denied, 434 U.S. 1033 (1978), the district court denied petitioner's motion to dismiss Count II and the pend-

ent counts and granted respondent "leave to show that the Secretary of Labor through [DOE] has made Davis-Bacon Act determinations with respect to the alleged contract, and that [respondent] and the class have performed such work at [petitioner's] direction, pursuant to the contract" (Pet. App. A18).

Petitioner thereupon moved for summary judgment, submitting an affidavit of John R. Frazier, Chief Legal Counsel for the Fermi National Accelerator Laboratory, which stated that "[n]o Davis-Bacon Act * * * stipulations requiring the payment of prevailing wages have ever been made a part of or incorporated in [the] Contract" (Pet. App. A24–A25). Respondent opposed the motion, contending that the omission of Davis-Bacon Act provisions from the contract amounted to a violation of the Act "which should not serve to shield [petitioner] from [respondent's] implied right of action found in *McDaniel* v. *University of Chicago*" (Pet. App. A25). The district court (Judge Leighton) granted summary judgment in favor of petitioner. The court observed that "no Davis-Bacon Act determinations have been made a part of this contract, requiring [petitioner] to pay [respondent] at wage rates contemplated by the Davis-Bacon Act" (Pet. App. A25–A26). After an examination of the statutory and regulatory framework of the Davis-Bacon Act, the court concluded that "it would be improper * * *to declare in the first instance that this contract is now subject to the Davis-Bacon Act and to make appropriate wage determinations for the parties" (*id.* at A27).[12]

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[12]The court dismissed the pendent counts after granting summary judgment in favor of petitioner on Count II (*ibid.*).

The court of appeals reversed and remanded (595 F.2d 396 (1979); Pet. App. A1–A12) on the basis of its decision in *McDaniel*. The court reasoned (*id.* at A5):

> [T]wo theories of recovery remained open to [respondent] after Judge McGarr's dismissal [of Count I]: (1) there may have been Davis-Bacon Act stipulations in the contract or (2) there may have been other evidence that the contract was one for Davis-Bacon Act work, in which case the required stipulations arguably become a part of the contract by operation of law. Judge Leighton's grant of summary judgment was based on the affidavit * * * tending to disprove only the first of these two theories. We hold that summary judgment was improperly entered against [respondent] and his class because the required wage stipulations were incorporated by operation of law.

In the court of appeals' view, "if the [petitioner] actually performed [Davis-Bacon] work with its own employees at the Fermi Laboratory, [respondent and his class] became entitled to the prevailing wages in Kane County where the work was to be performed. This conclusion follows from our holding in *McDaniel* v. *University of Chicago*, *supra*" (Pet. App. A6). The court rejected petitioner's contention that, assuming a private right of action exists under *McDaniel*, exhaustion of administrative remedies is a prerequisite to judicial relief (*id.* at A10). The court concluded that if on remand respondent could prove that he and his class had performed construction, alteration or repair work at the laboratory, they would be entitled "to recover wages that the Secretary of Labor has determined to be prevailing for the corresponding classes of

laborers and mechanics employed on similar projects in Kane County, Illinois" (*id.* at A12).[13]

SUMMARY OF ARGUMENT

The Davis-Bacon Act does not confer a private right of action for back wages against a contractor in favor of an employee who has performed work under a contract that has been administratively determined not to call for Davis-Bacon work and that accordingly does not contain prevailing wage specifications. Although the Davis-Bacon Act was passed for the especial benefit of construction workers (see *United States* v. *Binghamton Construction Co.*, 347 U.S. 171, 178 (1954)), there is strong evidence of a legislative intent to deny a private remedy such as that recognized by the court of appeals.

To begin with, the Davis-Bacon Act includes a specific judicial remedy on behalf of laborers—a suit on the Miller Act bond required for construction contracts—and it is therefore appropriate to presume that Congress did not intend the implication of other remedies. Moreover, in amending the Act in 1964 Congress refused to consider a proposal that would have provided for a private right of action and judicial review of agency determinations under the Act, thus evidencing both Congress' assumption that the existing statute does not provide such a private right of action and its intent to preclude that remedy. Indeed, it has long been settled that the Miller Act, on which the statutory remedy in the Davis-Bacon Act was mod-

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[13] The court of appeals also assumed that on remand the district court would decide the pendent claims presented in Counts III-VII of the complaint (*ibid.*).

eled, does not permit a private judicial remedy other than the one expressly provided.

Finally, it would be inconsistent with the statutory scheme to allow employees to bring an action seeking back wages, perhaps years after the contract has been let and the work completed, based on an allegedly incorrect agency coverage determination. The rights explicitly granted in the Davis-Bacon Act represent a balance between the often-competing goals of protecting laborers and promoting the efficiency and fiscal integrity of the government procurement process. A court-imposed alteration in the remedies available would upset this balance, because it would inject substantial uncertainty in an area—wage and coverage determinations—that requires uniformity and consistency.

In light of these considerations, the court of appeals erred in implying an additional private remedy for back wages under the Davis-Bacon Act. As this Court recently noted, "the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person." *Cannon* v. *University of Chicago*, 441 U.S. 677, 688 (1979). Rather, "[t]he ultimate question is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law." *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 578 (1979).

ARGUMENT

THE DAVIS-BACON ACT DOES NOT CONTAIN AN IMPLIED PRIVATE RIGHT OF ACTION IN FAVOR OF AN EMPLOYEE WHO ALLEGES THAT HE WAS NOT PAID THE PREVAILING WAGES REQUIRED BY THE ACT BECAUSE OF AN ERRONEOUS COVERAGE DETERMINATION

A. The Davis-Bacon Act does not confer an implied right of action against a contractor in favor of an employee for back wages under a contract that has been administratively determined not to call for Davis-Bacon work and that therefore does not include Davis-Bacon stipulations.[14] The court of appeals accordingly erred in holding to the contrary on the basis of its prior decisions in *McDaniel* v. *University of Chicago*, *supra*.

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[14]There is no need for the Court to decide in this case whether such a private right of action may be implied in favor of an employee under a contract that contains Davis-Bacon stipulations, but who has nevertheless not been paid the prevailing wages the Act requires. As we pointed out in our Amicus Brief in *University of Chicago* v. *McDaniel*, No. 76-1464, at pages 9-12, an employee who has not received the minimum wages that his employer has contracted with the government to pay should be able to recover in a suit on the contract as a third-party beneficiary. An employee should also be able to recover in a contract action if Davis-Bacon Act stipulations are inadvertently omitted from a contract, where the contracting agency concedes that the omission was erroneous. In that case, the Davis-Bacon stipulations would be deemed to be incorporated by operation of law. *G.L. Christian & Assoc.* v. *United States*, 312 F.2d 418 (Ct. Cl.), rehearing denied, 320 F.2d 345, cert. denied, 375 U.S. 954 (1963).

Moreover, this case does not present the question whether an employee would have a cause of action against the government (either at the time of contract bid solicitations or thereafter) to challenge a final agency decision not to include Davis-Bacon Act specifications in a contract. We express no views on this question. Cf. note 7, *supra*.

The court of appeals' rationale for its present decision was explained in *McDaniel I* (512 F.2d 583, 587 (1975)):

> In a case in which the express remedies provided * * *, e.g., the withholding of accrued payments due the contractor by the government for direct payment to underpaid laborers and mechanics (40 U.S.C. § 276a(a)) and a suit on the required Miller Act payment bond (40 U.S.C. § 270b(a)), have proved ineffective, we should be especially "alert to provide such remedies as are necessary to make effective the congressional purpose." *J.I. Case* v. *Borak*, 377 U.S. 426, 433, 84 S. Ct. 1555, 1560, 12 L. Ed. 423 (1964).

In *McDaniel II* (548 F.2d 689 (1977)), the court of appeals reaffirmed its initial holding after reassessing the case, pursuant to this Court's directive (423 U.S. 180 (1975)), in the light of *Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412 (1975), and *Cort* v. *Ash*, 422 U.S. 66 (1975). Applying the four factors identified in *Cort* to determine Congress' intent with respect to allowing a private right of action in a federal statute that does not expressly provide such a remedy, the court reasoned that (1) the Davis-Bacon Act was passed for the special benefit of laborers and mechanics; (2) Congress had impliedly recognized that laborers and mechanics could sue "at least as third-party beneficiaries of the contract required by 40 U.S.C. § 276a in state court or in federal court if there were proper jurisdiction" (548 F. 2d at 694);[15] (3) the

[15] The court relied in part for this conclusion upon its interpretation of the legislative history of the Portal-to-Portal Act provision that provides a two-year statute of limitations for "any cause of action for unpaid minimum wages * * * under * * * the Davis-Bacon Act" (29 U.S.C. 255). We discuss this provision at pages 25–29, *infra*.

remedies expressly provided by the Act were ineffective for accomplishing the statutory purpose; and (4) an action in federal rather than in state court is appropriate since "the right to recover the unpaid portion of the prevailing wages is based on the congressional choice of a federal policy" (*id.* at 695). The court accordingly concluded that "implying a private right of action in the Davis-Bacon Act is necessary to effectuate the intention of Congress in passing the statute" (*ibid.*).

In the present case the court of appeals merely noted that its decision "flow[ed] directly from the *McDaniel* opinions" (Pet. App. A2).

B. This Court's recent decisions emphasize that implication of a private right of action presents a question solely of "statutory construction." *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 568 (1979); *Cannon* v. *University of Chicago*, 441 U.S. 677, 688 (1979). In resolving that question, the Court has held, it is necessary to determine "whether Congress intended to create the private right of action asserted." *Touche Ross & Co.* v. *Redington*, *supra*, 442 U.S. at 568.

The Court has refocused the analysis in *Cort* v. *Ash*, 422 U.S. 66, 78 (1975), explaining that a right of action should not be implied simply because a majority of the standards specified in *Cort* has been met. Those standards are not of equal significance, and the central inquiry is "whether Congress intended to create, either expressly or by implication, a private cause of action." *Touche Ross & Co.* v. *Redington*, *supra*, 442 U.S. at 575. As the Court explained in *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, No. 77–1645 (Nov. 13, 1979), slip op. 4:

> While some opinions of the Court have placed considerable emphasis upon the desirability of implying private rights of action in order to provide remedies thought to effectuate the purposes of a given statute, *e.g.*, *J.I. Case Co.* v. *Borak*, *supra*, what must ultimately be determined is whether Congress intended to create the private remedy asserted* * *.

Thus, "the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person." *Cannon* v. *University of Chicago*, *supra*, 441 U.S. at 688. "The ultimate question is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law." *Touche Ross & Co.* v. *Redington*, *supra*, 422 U.S. at 578.

These decisions cast substantial doubt on the court of appeals' holding that an implied right of action for laborers and mechanics is necessary in order to further "the congressional purpose" in enacting the Davis-Bacon Act (*McDaniel I*, *supra*, 512 F.2d at 587). Moreover, as we discuss below, the court of appeals also misapplied the four factors identified in *Cort* v. *Ash*. Applying the *Cort* criteria in light of this Court's instructions in *Touche Ross* and *Transamerica*, we believe that Congress plainly intended the back-wage remedies expressly provided by the Davis-Bacon Act to be exclusive and that courts may not fashion additional private enforcement remedies they consider essential "to effectuate the intention of Congress in passing the statute" (*McDaniel II*, *supra*, 548 F. 2d at 695).

C. The four factors set forth in *Cort* v. *Ash*, *supra*, 422 U.S. at 78, are:

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted" * * *—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? * * * Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? * * * And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

As to the first factor, both the language of the Davis-Bacon Act and its legislative history indicate that laborers and mechanics on federal construction contracts are the "especial" intended beneficiaries of the statute. The committee reports on the Act explain that "[t]he purpose of this measure is to require contractors and subcontractors * * * to pay their employees the prevailing wage rates when such wage rates have been established by private industry." S. Rep. No. 1445, 71st Cong., 3d Sess. 1 (1931); H.R. Rep. No. 2453, 71st Cong., 3d Sess. 1 (1931). In 1935, the Act was amended to provide the enforcement provisions codified in 40 U.S.C. 276a–1 and 276a–2 after a Senate subcommittee reported that "unscrupulous contractors have taken advantage of the wide-spread unemployment among the buildings crafts to exploit labor and to deprive employees of the wages to which they were entitled under the law." H.R. Rep. No. 1756, 74th Cong., 1st Sess. 1 (1935). See also S. Rep. No. 1155, 74th Cong., 1st Sess. 1–2 (1935). And in 1964, the Act

was further amended to require the Department of Labor to consider fringe benefits in determining the level of prevailing wages. The Senate Report on the amendment states (S. Rep. No. 963, 88th Cong., 2d Sess. 2 (1964)):

> Almost from the inception of Federal construction activity Congress recognized the necessity for providing basic wage protection to local laborers and mechanics employed on the construction. It was precisely for the purpose of providing this protection that Congress passed the Davis-Bacon Act more than 30 years ago.

See also *United States* v. *Binghamton Construction Co.*, 347 U.S. 171, 178 (1954), where this Court noted that, "[o]n its face, the Act is a minimum wage law designed for the benefit of construction workers." Accord, *Walsh* v. *Schlecht*, 429 U.S. 401, 411 (1977).

We also agree with the court of appeals that recognition of a private cause of action under the Davis-Bacon Act would not intrude the federal courts into an area that is basically the concern of the states. The failure to pay mechanics and laborers the prevailing wages required by the terms of a government construction contract could be challenged under state law by the employees as third-party beneficiaries of the contract (see page 17, note 14, *supra*). But a suit challenging the *failure to include* a prevailing-wage provision in a government contract requires a determination of the scope of the coverage of the Davis-Bacon Act and thereby implicates matters of federal rather than state policy.[16] Accordingly, the right of ac-

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[16] Moreover, as in *Cannon* v. *University of Chicago*, *supra*, 441 U.S. at 708–709, "it is the expenditure of federal funds that provides the justification for this particular statutory prohibi-

tion created by the court of appeals is not "one traditionally relegated to state law" (*Cort* v. *Ash*, *supra*, 422 U.S. at 78).

Outweighing these two factors, however, is the strong evidence of congressional intent to deny any remedy other than the enforcement provisions expressly contained in the Davis-Bacon Act. In *National Railroad Passenger Corp.* v. *National Ass'n of Railroad Passengers*, 414 U.S. 453, 458 (1974), the Court took note of "[a] frequently stated principle of statutory construction" that "when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies." The presumption is that *expressio unius est exclusio alterius*. See also *Brown* v. *General Services Administration*, 425 U.S. 820, 829 (1976); *Touche Ross & Co.* v. *Redington*, *supra*, 442 U.S. at 574; *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, *supra*, slip op. 8. While such a presumption "must yield to clear contrary evidence of legislative intent" (*National Railroad Passenger Corp.* v. *National Ass'n of Railroad Passengers*, *supra*, 414 U.S. at 458), there is no such evidence in the legislative history of the Davis-Bacon Act.

Indeed, the available evidence is strongly to the contrary. The legislative history of the 1964 amendments to the Davis-Bacon Act indicates that Congress did not believe the Act then granted any implied right of private action for unpaid wages by employees against employers, and it rejected the opportunity to amend the Act to do so. While the 1964 amendments were

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tion. There can be no question but that this aspect of the *Cort* analysis supports the implication of a private federal remedy."

under consideration, Representative Goodell proposed a bill, H.R. 9590, 88th Cong., 2d Sess. (1964), that would have amended the Act to provide such a remedy. Representative Goodell sought to have the substance of H.R. 9590 considered in the House debate on H.R. 6041, 88th Cong., 1st Sess. (1964), a bill to amend the Act by defining prevailing wages to include fringe benefits. After extensive debate concerning whether the Davis-Bacon Act should allow for judicial review, the House voted to invoke the parliamentary rule against nongermane amendments, and it refused to consider Representative Goodell's proposal. 110 Cong. Rec. 1194–1204 (1964). Representative Goodell then introduced a second amendment to provide for judicial review only of fringe benefit determinations, and this amendment was defeated. 110 Cong. Rec. 1227–1228 (1964).[17]

More significant than the House action itself, however, is the fact that the members participating in the debate preceding the invocation of the nongermane rule explicitly voiced their belief that the Davis-Bacon Act contemplated no judicial review of agency decisions implementing the Act. That belief necessarily implies that there is no private right of action by employees to enforce the Act.[18] The disagreement among

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[17] The court of appeals in *McDaniel II* rejected the University of Chicago's reliance upon the fate of the first Goodell proposal (H.R. 9590), mistakenly asserting that that bill "dealt with the narrow issue of judicial review of the Secretary of Labor's determination of prevailing fringe benefits" (548 F.2d at 694).

[18] The focus of the debate was on the desirability of providing for judicial review of determinations of the Department of Labor under the Act—primarily wage determinations (see, *e.g.*, 110 Cong. Rec. 1197 (1964) (remarks of Rep. Goodell)), 1198

the participants in the debate was solely over whether the Act should be amended to permit judicial review. See 110 Cong. Rec. 1194–1204 (1964). Congress declined to add such a provision. This refusal strongly counsels against judicial creation of a private right of action by implication.

The court of appeals in *McDaniel II* nevertheless found an implied private right of action for the benefit of laborers and mechanics by reading the Davis-Bacon Act *in pari materia* with the Portal-to-Portal Act of 1947, ch. 52, 61 Stat. 84, as amended, 29 U.S.C. 251 *et seq.* The court relied particularly upon 29 U.S.C. 255, which imposes a two-year limitation on any cause of action for "unpaid minimum wages, unpaid overtime compensation, or liquidated damages" under the Fair Labor Standards Act, the Walsh-Healey Act, or the Davis-Bacon Act. Since the Miller Act imposes a one-year limitation on all suits on the contractor's bond (40 U.S.C. 270b(b)), the court reasoned that "[u]nless the Portal-to-Portal two year statute of limitations on Davis-Bacon actions is a nullity," Congress must have contemplated direct suits by employees against their

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(remarks of Reps. Griffin, Landrum, and Roosevelt), 1200 (remarks of Reps. Pucinski and Broyhill), 1201 (remarks of Rep. Fogarty), 1202 (remarks of Rep. Skubitz)). Nevertheless, several comments demonstrate the assumption that the Act precluded judicial review of *any* agency decision under the Act. See, *e.g.*, 110 Cong. Rec. 1197 (1964) (remarks of Rep. Goodell) ("The Davis-Bacon Act is the only Federal wage-fixing law on the books where you do not have a provision for aggrieved parties to get into the court and let the judge tell them what Congress meant when it wrote the law"). Accord, 110 Cong. Rec. 1200 (1964) (remarks of Rep. Broyhill); 1201–1202 (remarks of Rep. Bell). See also H.R. Rep. No. 308, 88th Cong., 1st Sess. 29–30 (1963) (dissenting views); S. Rep. No. 963, 88th Cong., 2d Sess. 4–5 (1964).

employers to enforce the provisions of the Davis-Bacon Act (548 F. 2d at 694).

The court of appeals appears to have read too much into the Portal-to-Portal Act. The limitations provision of that statute was not subjected to extensive legislative scrutiny at the time of enactment, and the reference in 29 U.S.C. 255 to the Walsh-Healey and Davis-Bacon Acts was itself an afterthought. When Congress enacted the Portal-to-Portal Act, it was primarily concerned with curtailing the flood of suits then being brought under the Fair Labor Standards Act after this Court's decision in *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). See *Unexcelled Chemical Corp.* v. *United States*, 345 U.S. 59, 61 (1953). The Senate bill (S. 70, 80th Cong., 1st Sess. (1947)) would have amended only the Fair Labor Standards Act "'to exempt employers from liability for portal-to-portal wages.'" S. Rep. No. 37, 80th Cong., 1st Sess. 1, 48 (1947). The House bill (H.R. 2157, 80th Cong., 1st Sess. (1947)) also included the Davis-Bacon Act and the Walsh-Healey Act. As the House Committee Report explained (H.R. Rep. No. 71, 80th Cong., 1st Sess. 5 (1947)):

> The Walsh-Healey Act also concerns itself in its field with minimum wages and overtime compensation. The Bacon-Davis Act has provisions relating to minimum wages and other conditions of employment. These two acts are therefore affected by the *Mount Clemens* decision. The situation described herein as to the Fair Labor Standards Act applies to that existing under the Walsh-Healey Act and the Bacon-Davis Act. The same necessity exists there for remedial legislation.

H.R. 2157 contained a one-year statute of limitations and thus was consistent with the enforcement provi-

sions of the Davis-Bacon Act. See 40 U.S.C. 270b(b) and 276a–2(b); H.R. Rep. No. 71, *supra*, at 7. In contrast, S. 70 provided for a two-year statute of limitations (S. Rep. No. 37, *supra*, at 48). Although the Senate Committee Report on H.R. 2157 agreed to the expanded coverage of the House bill, it retained the two-year limitation of S. 70. S. Rep. No. 48, 80th Cong., 1st Sess. 50–51 (1947). The two-year limitation was recommended by the conference committee (H.R. Rep. No. 326, 80th Cong., 1st Sess. 13–24 (1947)) and was enacted (Pub. L. No. 49, 61 Stat. 87).

There is no evidence anywhere in the legislative history of the Portal-to-Portal Act that Congress recognized that the new statute created two incompatible periods of limitation under the Davis-Bacon Act.[19] To the contrary, it appears that Congress proceeded upon the erroneous premise that "there is no limitation provision in either the Walsh-Healey or the Bacon-Davis Acts." S. Rep. No. 48, *supra*, at 42.[20] The amendment

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[19] The congressional debates on the Portal-to-Portal Act demonstrate the same unfamiliarity with the Davis-Bacon Act that is reflected in the committee reports. In the Senate debate on the House bill, Senator Donnell, a subcommittee member, indicated that he did not recall that the Davis-Bacon Act had been mentioned in the Senate subcommittee hearings on the legislation. 93 Cong. Rec. 2124 (1947); see also 93 Cong. Rec. 2083 (1947) (statement of Sen. Wiley); 93 Cong. Rec. 2250, 2253 (1947) (remarks of Sen. McGrath). However, the Senate subcommittee agreed with the House subcommittee that the Davis-Bacon Act and the Walsh-Healey Act should be included in the two-year statute of limitations of the Portal-to-Portal Act, as explained by Senator Wherry, "for the simple reason that [they] involve payments for hours worked." 93 Cong. Rec. 2193 (1947).

[20] During the debates, Senator McGrath argued that a two-year period of limitation was too short, because "the administrative [claim] procedures which are necessary to determine the

to the Portal-to-Portal Act was intended simply to correct this asserted deficiency by "setting up a 2-year statute of limitations." *Id.* at 51.[21]

Moreover, it would be surprising if Congress had assumed the existence of an implied private cause of action under the Davis-Bacon Act in 1947. The Davis-Bacon Act's explicit private enforcement provisions incorporate those of the Miller Act (see page 4, *supra*). The Miller Act in turn derived from the Heard Act (Act of August 13, 1894, ch. 280, 28 Stat. 278). At the time the Miller Act was adopted, the statutory action on the required bond had been held to be the exclusive means of enforcing the Heard Act. See *United States to Use of Zambetti* v. *American Fence Construction Co.*, 15 F. 2d 450 (2d Cir. 1926); *United States* v. *Montgomery Heating & Ventilating Co.*, 255 F. 683 (5th Cir. 1919); *Strong* v. *American Fence Construction Co.*, 245 N.Y. 48, 156 N.E. 92 (1927).[22] After the

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validity of the workman's claim for back wages under the Davis-Bacon Act frequently take a considerable length of time which may very easily run for a period of more than 2 years." 93 Cong. Rec. 2252 (1947). Senator McGrath's statement is significant because it indicates that the limitation in the Portal-to-Portal Act was intended to apply to the explicit statutory remedy provided in the Davis-Bacon Act, not to any implied right of action by employees against employers as assumed by the court of appeals in *McDaniel II* (548 F. 2d at 694).

[21] It is difficult to perceive any reason why Congress would have intended to establish two inconsistent statutes of limitations, particularly when the result would be to permit employees direct access to the courts under the Portal-to-Portal Act without satisfying the time limitations or following the administrative procedures contemplated by the express Davis-Bacon Act remedy. See *Touche Ross & Co.* v. *Redington*, *supra*, 442 U.S. at 574; *Brown* v. *General Services Administration*, *supra*, 425 U.S. at 833.

[22] In *Strong*, Judge Cardozo stated (245 N.Y. at 52, 156 N.E. at 93):

enactment of the Portal-to-Portal Act, the Miller Act also was so construed. See *Harry F. Ortlip Co. of Pennsylvania* v. *Alvey Ferguson Co.*, 223 F. Supp. 893, 894 (E.D. Pa. 1963); *Gallaher & Speck, Inc.* v. *Ford Motor Co.*, 226 F. 2d 728, 731 (7th Cir. 1955).[23] There is no apparent reason why Congress would have disagreed with this consistent line of cases, much less why it would have expressed its disagreement covertly in the subtle manner attributed to it by the court of appeals in *McDaniel II*. Cf. *Cannon* v. *University of Chicago*, *supra*, 441 U.S. at 694–699.[24]

> Congress has said that contractors shall be liable to materialmen and laborers in an amount to be made determinate by the giving of the bond. The statutory liability, which in turn is inseparably linked to the statutory remedy, assumes the existence of a bond as an indispensable condition. Till then, there is neither Federal jurisdiction nor any right of action that can rest upon the statute.

[23] These decisions merit consideration here because of the parallelism between the Miller and Davis-Bacon Acts. The Miller Act requires the contractor to furnish a bond for the benefit of laborers and materialmen on certain government construction contracts, while the Davis-Bacon Act sets the minimum wages that the contractors may pay to laborers and mechanics under similar contracts. Compare 40 U.S.C. (and Supp. II) 270a with 40 U.S.C. 276a. The remedy under either Act is the action on the bond provided by 40 U.S.C. 270b (see 40 U.S.C. 276a–2(b)). If a private right of action in favor of laborers and materialmen cannot be inferred from the obligations imposed on contractors under 40 U.S.C. (and Supp. II) 270a, there is no reason to infer a similar private right of action in favor of laborers and mechanics from the obligations imposed under 40 U.S.C. 276a, especially since essentially the same facts that render a contract subject to one Act also render it subject to the other.

[24] When Congress intended to permit private suits by employees to enforce federal statutory requirements concerning working conditions, it knew how to do so explicitly. See 29 U.S.C. 216 (Fair Labor Standards Act). The failure to include such an explicit provision in the Davis-Bacon Act thus is itself some evidence that no such right should be implied. See *Willis* v. *E.I.*

It would also be inconsistent with the legislative scheme to imply a private enforcement remedy under the Davis-Bacon Act. As we have discussed above (pages 3–8, *supra*), the Act requires the contracting agency to include, in the specifications for covered federal construction contracts, the Secretary of Labor's determination of the prevailing wages for construction workers on similar projects in the locality involved, and to incorporate into the contracts based on these specifications a stipulation that the contractor will pay at least those wages to all mechanics and laborers employed on the site. 40 U.S.C. 276a. In addition, the contract must permit the contracting officer to withhold from the amount due the contractor any amount necessary to assure that such laborers and mechanics are paid at the prevailing rates (*ibid.*). If the amount withheld is insufficient, the laborers and mechanics are granted the explicit right to sue on the payment bond required by the Miller Act (40 U.S.C. (and Supp. II) 270a) to recover the prevailing wage specified in the government contract (40 U.S.C. 276a–2(b)). The Davis-Bacon Act thus not only specifies the obligation of the contracting agency and the contractor but also describes the means available to the employee to assure that he receives the benefits of the Act where a contract includes Davis-Bacon provisions. Nothing in the legislation suggests that Congress intended to permit the disruption of the performance of govern-

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Du Pont de Nemours & Co., 76 F. Supp. 1010 (E.D. Okla.), rev'd on other grounds, 171 F. 2d 51 (10th Cir. 1948). See also *Touche Ross & Co.* v. *Redington*, *supra*, 442 U.S. at 571–572; *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, *supra*, slip op. 9; *Cannon* v. *University of Chicago*, *supra*, 441 U.S. at 730 (Powell, J., dissenting).

ment contracts by suits against a contractor challenging an agency's failure to include Davis-Bacon Act provisions in a contract alleged to be covered by the Act.

The disruption that would occur from implication of a private right of action would be substantial. As we have noted above, the Davis-Bacon Act and approximately 60 related statutes impose prevailing wage requirements upon most federal and federally-assisted construction contracts of all types (competitively bid, negotiated, fixed cost, cost plus, etc.) entered into or administered by government contracting agencies.[25] The enforcement of the Acts is governed by Reorganization Plan No. 14 of 1950 (5 U.S.C. App., at 746), which vests overall administrative responsibility in the Secretary of Labor to achieve coordination and consistency. But that consistency would be unattainable if the decision below were to result in a proliferation of suits by disgruntled contractor employees against their employers, with numerous federal courts becoming the arbiters of coverage determinations.

If a district court were to conclude, after a government contract had been entered into, that a laborer was entitled to be paid at the prevailing wage rate for construction workers because he was performing covered construction work, the contractor and the government would be forced either to reclassify similar jobs under the contract for the future or face the continued accrual of potential liability for back wages. In

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[25] We do not, of course, foreclose the possibility of an implied private cause of action under any of the related statutes, which do not provide for a remedy similar to a suit on the Miller Act bond.

turn, reclassification might suggest the necessity for substantial alteration of the coverage guidelines, which would entail difficult decisions about what work is sufficiently similar to that performed by the plaintiff to require reclassification.[26] Moreover, opening the provisions of existing contracts to judicial scrutiny for compliance with the Davis-Bacon Act would inevitably subject contractors to jurisdictional disputes between unions that represent construction workers and those that represent maintenance or other nonconstruction workers.

Federal budgeting would also be adversely affected by a determination, after a cost-plus contract has been let, that the higher construction wages must be paid even though such wages were not contemplated when the contract was let. Fixed-price procurement, too, would be adversely affected by the possibility of such a determination. The possibility of post-contracting challenges, with the concomitant potential for delays in performance due to court suits, injunctions, and efforts to reach administrative settlements, would significantly increase a bidder's uncertainty about what it would cost to perform the contract. This might discourage some potential bidders from competing for government contracts and might lead others to submit higher bids reflecting the possibility of increased costs.

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[26] These coverage decisions themselves would be subject to review in other suits, with all the possibilities for conflicting decisions that such review implies. At best, the courts and the agency would be faced with the task of harmonizing a proliferating number of decisions dealing with infinitely varying facts.

Finally, courts simply lack the expertise to make independent determinations in this area.[27] As we have explained earlier (pages 10–11, *supra*), DOE, the contracting agency involved here, has developed illustrative guidelines for determining what work constitutes "construction work" within the meaning of the Davis-Bacon Act under the complex research and development contracts that it administers. These guidelines (many of which have been approved by the Department of Labor) are applied to specific projects by special committees composed of members with technical, administrative and legal expertise. Under the contract in dispute here, which expressly provided that petitioner would not perform Davis-Bacon work, any work that the committee determined was subject to Davis-Bacon requirements was contracted out. Permitting the courts to overturn the committee's decisions in this highly technical area after the subcontract has been performed would be particularly inequitable in these circumstances. Respondent and the class he represents performed the disputed work only because it had been determined *not* to be subject to Davis-Bacon requirements. Suits by such employees, which could involve millions of dollars in back wages, brought

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[27] Thus, even if the Davis-Bacon Act affords employees a private right of action to challenge the omission of prevailing wage stipulations from their employers' contract with the government, the district courts should not make *de novo* determinations concerning whether the contract was one for "construction, alteration, or repair work" requiring the inclusion of such stipulations, but should stay proceedings under the doctrine of primary jurisdiction until the agencies concerned have made the initial coverage determinations. We have discussed this issue at greater length in our amicus brief (pages 17–23) at the petition stage in this case.

long after Davis-Bacon determinations have been made and the work has been performed in reliance on the accuracy of those determinations, would unfairly expose the contractor or the government to substantial costs in excess of those contemplated.

For all these reasons, Congress, when it provided specific administrative remedies and a limited judicial remedy (the suit on the Miller Act payment bond) for the enforcement of Davis-Bacon Act prevailing wage provisions, did not authorize employee-contractor suits, such as this one, that would require courts to make *ex post facto* coverage decisions in place of the agencies involved. Congress could scarcely have intended a private right of action of this type but "absentmindedly forgot to mention" it. *Cannon* v. *University of Chicago, supra*, 441 U.S. at 742 (Powell, J., dissenting). See also *Transamerica Mortgage Advisors, Inc.* v. *Lewis, supra*, slip op. 8. There is, instead, a strong suggestion that Congress did not intend to impose any monetary liability upon employers to reimburse employees for Davis-Bacon work performed under a contract that does not contain an express provision requiring payment of prevailing wages.

In sum, we conclude that two of the four criteria set forth in *Cort* v. *Ash* are met here—*i.e.*, respondent is one of the class for whose especial benefit the statute created a federal right, and federal, rather than state, law should control the assertion of that right. However, the remaining two criteria are plainly not satisfied, and it is those criteria that are most critical to the question of whether a private enforcement action should be implied. There are significant indications of a

legislative intent to limit the remedies under the Davis-Bacon Act to those expressly provided, and it would be inconsistent with the legislative scheme to find an implied private remedy in favor of employees against the contractor where no prevailing wage determination is in the contract because the agency has determined that the Act is not applicable. These factors are fatal to respondent's claim, since "[t]he central inquiry [is] whether Congress intended to create, either expressly or by implication, a private cause of action." *Touche Ross & Co.* v. *Redington*, *supra*, 442 U.S. at 575; *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, *supra*, slip op. 4. Accordingly, if there is a need for a further private enforcement remedy under the Act, it should be supplied by Congress and not the courts.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

ALICE DANIEL
Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

HARRIET S. SHAPIRO
Assistant to the Solicitor General

ROBERT E. KOPP
ELOISE E. DAVIES
Attorneys

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